Public Utilities

FORTNIGHTLY

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February 14, 1946

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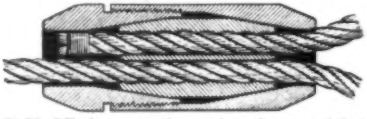

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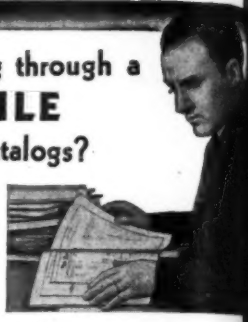

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Public Utilities Fortnightly

VOLUME XXXVII *February 14, 1946* NUMBER 4

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

PUBLIC UTILITIES REPORTS, INC., PUBLISHERS

Publication Office ..... CANDLER BUILDING, BALTIMORE 2, MD.
Executive, Editorial, and Advertising Offices ..... MUNSEY BUILDING, WASHINGTON 4, D. C.
(*Address all communications concerning the* FORTNIGHTLY *to Munsey Building, Washington 4, D. C.*)

PUBLIC UTILITIES FORTNIGHTLY, a magazine dealing with the problems of utility regulation and allied topics, including also decisions of the regulatory commissions and courts, preprinted from *Public Utilities Reports, New Series*, such Reports being supported in part by those conducting public utility service, manufacturers, bankers, accountants, and other users. Entered as second-class matter April 29, 1915, under the Act of March 3, 1879. Entered at the Post Office at Baltimore, Md., Dec. 31, 1936; copyrighted, 1946 by Public Utilities Reports, Inc. Printed in U. S. A.

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Pages with the Editors

IT may seem somewhat surprising that, although only a minority of public utility plants serving the various communities of the United States are owned and operated by municipalities and other public agencies, most of the controversy involving both labor disputes and rate charges has recently appeared in this particular sector. We realize, of course, that this has not been always so by any means, and is probably only a temporary condition. Perhaps for that very reason, the sudden emergence of the municipal plant in the field of labor and rate controversy is but a reflection of the unique problems which beset the municipalities and other public agencies when they enter the realm of commercial enterprise.

THE recent decision of the U. S. Supreme Court in the Saratoga Springs Case emphasizes a third special field of controversy with respect to public ownership operations—the issue of tax immunity. If this case had involved a Federal tax on the bottling works activity of a private corporation (as distinguished from commercial activities of the state of New York), there would have been, of course, no case at all. It was in this decision that Justice Frankfurter, writing the opinion of the court, laid down the thought-provoking principle that the Federal government may tax any line of activity "not uniquely capable of being earned only by a state" (or other public agency).

IF Congress takes this decision, badly split up as it was by four different opinions, as a green light for taxing other commercial activities of public agencies, it is quite likely that we shall hear much more about the Saratoga Springs Case.

IN the field of rate charges, it is noteworthy that within the same month three of our great municipalities operating their own transportation systems have become involved—two of them with the Office of Price Administration. In New York city, of course, there is the perennial issue of the 5-cent fare, which has become a political sacred cow. In Detroit we have the somewhat unusual spectacle of the OPA insisting on a "fact-finding" examination of the city's books, and thereafter denouncing a recent fare increase as unjustified. The OPA report, in turn, was denounced by the city administration as a "smear." The local CIO unions endorse the OPA report. In San Francisco, the city agreed to defer the effective date of fare increase on the city's railway system because of OPA's insistence that it had not been given its statutory opportunity of intervention. Again, the local CIO unions backed up OPA demands.

BUT it is once more in New York city that the recent threatened subway strike by the CIO Transport Workers Union, headed by Michael J. Quill, posed a problem which is certainly "unique," if not entirely unprecedented, in all the annals of public utility operations throughout the United States. Here, the city's board of transportation was considering the sale of three relatively small power plants now furnishing power for two of the New York city subways, because it felt that it could obtain power from the larger system of the Consolidated Edison Company at a cheaper rate, in view of the fact that rehabilitation of the plants would involve considerable outlay. Whatever the merits of the board's judgment on this question, certainly it was a managerial question.

IF the subway were still being operated by private companies, it is hard to conceive that any labor union would have even entertained the notion of objecting, much less threatening to strike, because it did not like the management's policy decision on such a matter. But Mr. Quill's union threatened to strike; and the newly elected Mayor O'Dwyer surrendered to his demands. It is probably the first time that organized labor has succeeded in winning a victory through threat of strike on a point which was almost entirely political and did not involve a labor issue.

WHERE is this trend going to end? If a union can strike successfully to prevent a municipality from selling part of its utility properties, it is only one more step for a union to strike in order to compel a city to buy a utility property. Perhaps our whole issue of public ownership could be settled for us by the labor unions instead of by Congress, state legislatures, popular elections, and other usual forums of public policy.

WE can also sympathize with Mayor O'Dwyer's position. The noble dictum that there can be no strike against the sovereign power of government has an impressive genesis,

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going back through reassurances of Mayor O'Dwyer's predecessor, Mr. LaGuardia, as well as strong and uncompromising utterances of three former Presidents: Franklin Roosevelt, Calvin Coolidge, and Grover Cleveland.

WE suspect that an enterprising legalist could carry it much farther back, through the obscure and authoritative recesses of common law.

BUT in practical application it is getting a little threadbare. The Federal government has had pretty good luck to date in getting recalcitrant employees to return to their jobs in essential industries by the mere formality of the government's seizure. But Washington observers seem agreed that it is pushing its luck a little hard. Mayor O'Dwyer could have had no illusions that Mr. Quill's union would have respected the theoretical sovereignty of the lower level of government, of which he is the elected executive.

WHAT is more, O'Dwyer could not run to the Federal government to bail him out of his difficulty, through Federal seizure, as in the case of the meat packers and other industries. Under the law, the Federal government cannot seize the property of the city of New York. Otherwise, we might run into such absurd situations as having a couple of GI's picking up Mayor O'Dwyer and carrying him out of city hall. No, the city of New York being, itself, a form of government would have to work out its own solution.

TAKEN altogether, there seem to be many more questions popping up here in the field of public ownership activities than there are answers. It looks rather like a busy decade ahead for the courts and the lawmakers to work out the lines of demarcation which will protect and regulate labor, management, taxation, and rate fixing as they involve utility operations conducted by public agencies.

TWO articles in this issue reflect different facets of this bubbling controversy of municipal operations. Beginning page 221, we have an interesting account of how the Los Angeles Department of Water and Power is trying to solve its employee relations problem by a new approach to civil service classification. The author, C. ERNEST HILL, is connected with that organization.

THE opening article in this issue is the second installment of DANA B. VAN DUSEN's 3-part series on "The Nonprofit Subterfuge for Acquiring Public Utilities." MR. VAN DUSEN is a prominent Omaha attorney whose personal background was described in our issue of January 31st.

SOMEWHAT of an innovation and departure from the usual style of articles is the one beginning page 213, which purports to be written—of all things—by a dog. BRUCE MCALISTER, who uses this whimsical approach to the ancient feud between the utility's meterman and the customer's dog, is a veteran trainer and handler of dogs who recently retired from a successful kennel business in Ontario. But his life-long attachment to man's best friend naturally makes dog problems MR. MCALISTER's primary consideration.

ONE item of incidental interest which came up during our editorial interview with MR. MCALISTER was the fact that of the many, many snapshots of dozens and dozens of different dogs which he has trained and handled during his career, the great majority of them were obviously of no certain breed or, to use his phrase, were "just plain mutts." We thought this strange, inasmuch as MCALISTER had handled and judged as many blue-ribboned entries in his time as anybody in that particular business. By way of explanation, he told us something which we had not known—that mixed-breed dogs were preferred by professional trainers of "dog circuses," vaudeville acts, and other entertainment features requiring long and careful training of dogs to do difficult tricks.

ASIDE from the substantial item of investment for new dog recruits, MCALISTER pointed out that pure-bred dogs are more often subject to nervousness and impatience. In other words, you can breed a dog to obtain almost any desired physical characteristic, "but you can't breed a dog for brains." There is probably a moral here for the more extreme disciples of eugenics, but maybe we had better leave the matter lay right there without further comment or argument.

AMONG the important decisions preprinted from *Public Utilities Reports* in the back of this number, may be found the following:

THE Securities and Exchange Commission discusses the deductibility of income taxes in computing return for rate purposes, and the relation of this question to income statements and accounting. (See page 193.)

THE general rule that costs and expenses, including interest, arising from the borrowing of capital are to be excluded from the computation of gross income for rate-making purposes is discussed by the Securities and Exchange Commission. (See page 193.)

THE effect of decisions of the Supreme Court of the United States, in cases under Federal statutes accepting standards other than fair value for rate-making purposes, on a state law requiring the fair value basis, is ruled upon by the Pennsylvania Superior Court. (See page 226.)

THE next number of this magazine will be out February 28th.

The Editors

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In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In the Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 193-256, from 61 PUR(NS)

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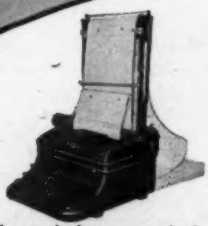

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—MONTAIGNE

WILLIAM GREEN
President, American Federation of Labor.

"There is no better market for American industry than the full pay envelope of the great masses of American workers."

WILLIAM A. PITTENGER
U. S. Representative from Minnesota.

"Unless somebody decides that the St. Lawrence seaway and power project is to have the right of way, then it will still continue to be an Egyptian mummy."

R. J. THOMAS
President, United Auto Workers.

"Just as sure as the sun rises tomorrow, when more controls are put on labor, you can be sure it won't be long before more controls are put on management."

EDITORIAL STATEMENT
The New York Times.

"The center of the present economic confusion, in brief, is in Washington. It is there that the need lies first of all to 'cut out all the foolishness' and 'go to work.'"

L. R. CLAUSEN
President, J. I. Case Company.

"The constitutional right to work has been largely removed or eliminated by labor unions with the support of labor boards or other representatives of the government itself."

JOHN C. KNOX
Federal District Court Judge.

"If business and industry can be relieved of the constant threat of governmental competition, freed from the burdens of undue regulation, and assured of the fairness of the demands of union labor, the hum of factories and the whir of spindles again will be heard throughout the land."

EDITORIAL STATEMENT
The Hartford (Connecticut) Courant.

"If there is a suspicion that Federal flood control is intended only as a mask to cover the creation of another authority like TVA, the best way to avoid such action is by the creation of an active joint committee representing the states concerned to participate with the Federal government in formulating plans."

JOSEPH P. KENNEDY
Former Ambassador to Great Britain.

"If the state is to dominate the individual, thinking for him, sustaining him in slavish dependence, dictating his religious views, his political views, and even his culture and environment as the Nazi, Italian, and Russian totalitarian states have done, reducing men to mere ciphers and substituting state-disciplined loyalties for individual dignity, then the winning of the Second World War will have proved a hollow victory."

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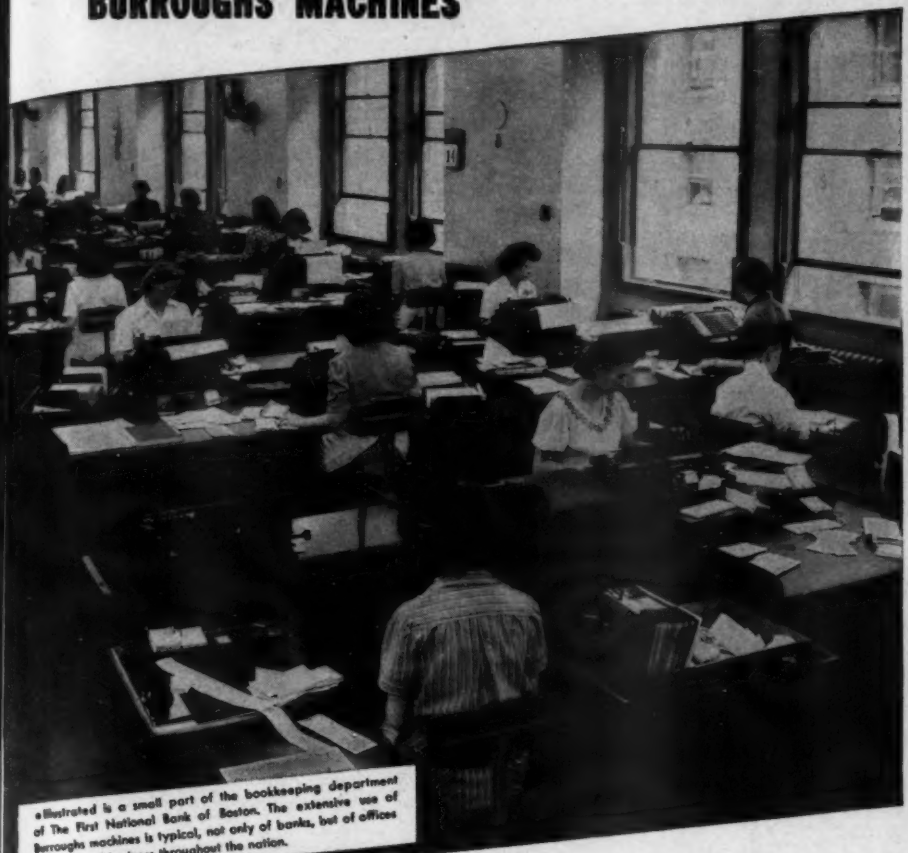

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ELLWOOD J. TURNER
Chairman, water resources committee, Council of State Governments.

"Until the cloud on the right of Congress to create TVA's is permanently lifted, there should be no further effort to force a TVA upon a region which does not want it, or to smother the country with them. That is not democracy."

EDITORIAL STATEMENT
Monthly letter of the National City Bank of New York.

"The whole economic situation would benefit if the unions, moving more slowly, allowed the necessary time for the facts to appear and meanwhile devoted their influence and effort to hasten reconversion and expand production."

WILLIAM H. DAVIS
Former chairman, War Labor Board.

"We have to face the fact that if you fail to achieve and stabilize the high level of production, if you choose periods of boom and bust—if, in other words, you fail to stabilize prosperity—mankind is on the road to destruction."

ERIC A. JOHNSTON
President, United States Chamber of Commerce.

"We can't bring about industrial peace in a tangle of tight nerves and tough talk. This is a time for fair play and common sense. It is a time to exercise moderation and restraint; to show a willingness to hear the other fellow's point of view."

HAROLD L. ICKES
Secretary of the Interior.

"I would consider it unwise and unfortunate for government to interpose itself in any phase of the oil business which can be handled by the petroleum industry efficiently and economically and with the satisfaction that a fair profit brings."

CARTER MANASCO
U. S. Representative from Alabama.

"A [full employment] bill of this type in all probability would change our system of government for years and years to come. It would remove any necessity for the Congress of the United States. I think that is the intention of some of the people who are back of this bill."

HENRY WALLACE
Secretary of Commerce.

"Government has got to make it possible for this condition of full production and full employment to be attained. Government has to create the kind of climate in which private enterprise can function at top speed in this free country. There is now before Congress a bill which, to my mind, constitutes a necessary first step—the Full Employment Bill."

FRED M. VINSON
Secretary of the Treasury.

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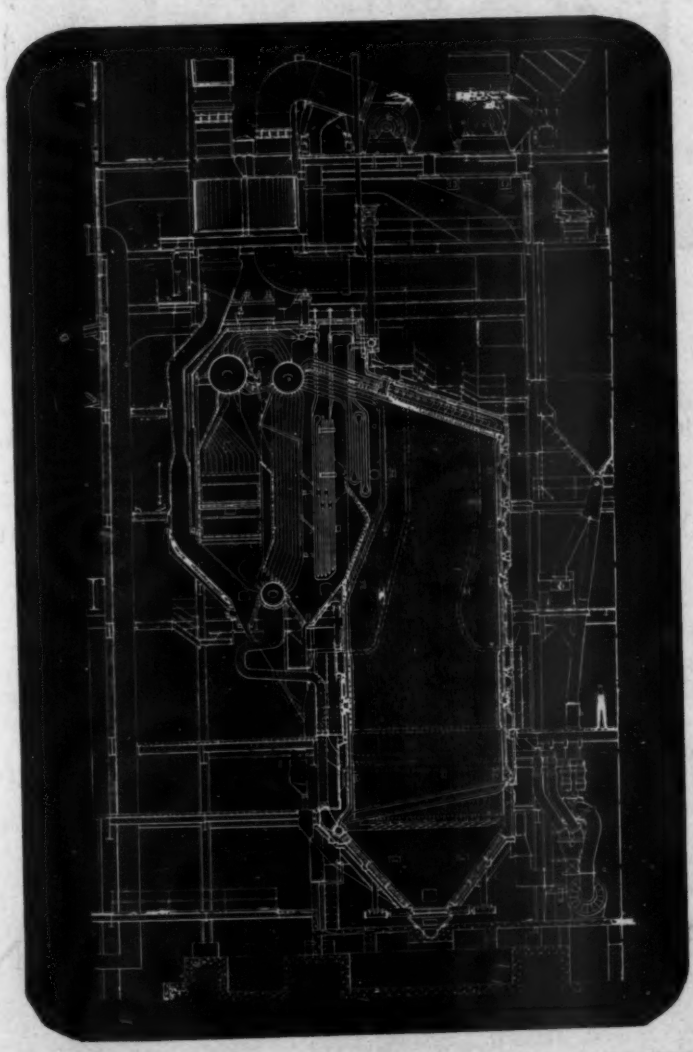

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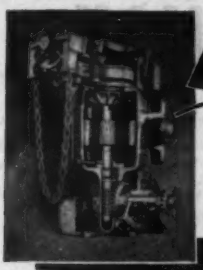
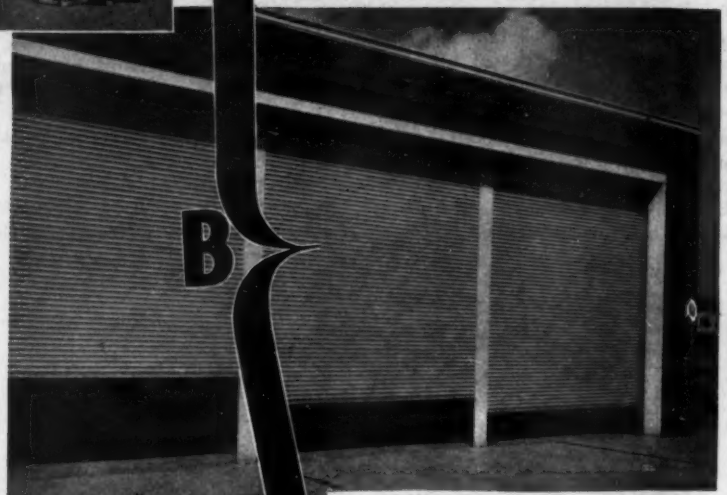


THE ABC's of DOOR EFFICIENCY



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KINNEAR ROLLING DOORS

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Utilities Almanack

February

14	T[h]	¶ *Pennsylvania Electric Association, Electrical Equipment Committee, begins meeting, Pittsburgh, Pa., 1946.*
15	F	¶ *National Rural Electric Coöperative Association will hold annual meeting, Buffalo, N. Y., Mar. 4-6, 1946.*
16	S[a]	¶ *American Water Works Association, Minnesota Section, will hold meeting, Minneapolis, Minn., Mar. 14, 15, 1946.*
17	S	¶ *Southern Gas Association will hold annual meeting, Galveston, Tex., Mar. 21, 22, 1946.*
18	M	¶ *EEI, Transmission and Distribution Committee, starts meeting, Cincinnati, Ohio, 1946.* ¶ *AGA, Technical Conference on Domestic Gas Research, begins, Cleveland, Ohio, 1946.*
19	T[u]	¶ *Federal Power Commission resumes natural gas investigation hearings, Chicago, Ill., 1946.*
20	W	¶ *Edison Electric Institute, Electrical Committee, starts meeting, Cincinnati, Ohio, 1946.*
21	T[h]	¶ *American Water Works Association, New Jersey Section, winter meeting begins, New Brunswick, N. J., 1946.*
22	F	¶ *New England Gas Association will hold annual business conference, Boston, Mass., Mar. 21, 22, 1946.*
23	S[a]	¶ *Edison Electric Institute, Commercial Section, will convene, Chicago, Ill., Mar. 26–28, 1946.*
24	S	¶ *American Gas Association, Conference on Industrial and Commercial Gas, will convene, Toledo, Ohio, Mar. 28, 29, 1946.*
25	M	¶ *Exposition of Chemical Industries opens, New York, N. Y., 1946.*
26	T[u]	¶ *Midwest Power Conference will be held, Chicago, Ill., Apr. 3–5, 1946.*
27	W	¶ *Kentucky Independent Telephone Association will hold session, Apr. 4, 5, 1946.*

Authenticated News

Pipe-line Protection

The above photograph shows the method by which protective covering was applied to the 1,265-mile natural gas pipe line from Texas to West Virginia. The covering, necessary to protect the pipe against corrosion, was applied before burying the sections of pipe in the trench dug along the side of the road.

Public Utilities
FORTNIGHTLY

VOL. XXXVII, No. 4 FEBRUARY 14, 1946

The Nonprofit Subterfuge for Acquiring Public Utilities

Part II. *Legal existence of nonprofit corporations*

Consideration of the question whether so-called nonprofit corporations, organized for the purpose of taking over utility properties, have any legal existence at all, as well as the collateral question whether a declared trust under such circumstances has any legal existence.

BY DANA B. VAN DUSEN
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WE have seen that there is considerable question about the legality of a nonprofit corporation, when viewed as a so-called "instrumentality of a state" in acquiring utility properties for eventual public ownership. This, despite the ostensible nonprofit character of the corporation, the apparent public benefit, and assuming the nobility of intent on the part of the incorporators. There remains for further examination, however, the question of whether the nonprofit corporation, used for such a purpose, has any real legal existence at all. There is also the collateral question of whether a declared trust under such circumstances has any legal existence. These questions are by nature interwoven with the question of whether a political subdivision can legally acquire utility property through such a short cut, so that separate discussion is somewhat difficult.

Perhaps it would be easiest to start with a little examination of the nature of the alleged trust under which the nonprofit corporation purports to acquire utility properties for the use of, or eventual ownership by, the public. Let us begin with a bare recapitulation of certain fundamental qualifications of a trust which are so elementary and so well settled that we can assume them as valid without further citation of authority:

1. It (a trust) can be created only by the present owners of property or right of value.
2. Such property must be described adequately and subject to control of the disposer.
3. The property or its benefits must be made subject to possession by the beneficiary.
4. Conditions of the trust administration must be established with certainty.
5. A trust cannot be forced upon a beneficiary.
6. A trust must be capable of enforcement by the courts.

Are these requirements met by this more or less ingenious device of the nonprofit corporation?

We may note in passing that while the acceptance of a beneficial trust is usually presumed, such presumption may be overcome by some act or evidence of rejection by the beneficiary. Again, such presumption does not exist when the trust is obviously contrary to the interests of the beneficiary. Nor does it exist where the trust is a complicated one involving many conditions and limitations, where it is unusual and peculiar, or when it requires the beneficiary to assume financial and other burdens.

For one example, suppose I am the owner of an insolvent property (a public utility, if you prefer to be specific). I declare a trust of that property in your favor on condition that you will continue to operate it and will finance and pay off its obligations, etc., etc. Do you think a legal trust could be presumed, or if presumed, could stand in the face of your actual or implied rejection of it? Of course not.

Suppose, for a further example, that I am the owner of all the common stock of a profitable public utility. I declare a trust of that stock in your favor on condition that you acquire and pay for all of the balance of the ownership in that property. Suppose that, in acquiring the balance of the property (which may be worth many times the value of common stock), you would have to assume numerous contracts which I have made. These contracts may control the operation of the property for many years. Do you believe that I could induce the courts to sustain this "trust" in the absence of your clearly expressed acceptance? Let us not forget that the profitable utility of today (such as a railroad) may become the insolvent corporation of tomorrow.

So much for rejection, direct or implied. Let us next consider the *power* of the beneficiary to *accept* the trust even when he is disposed to do so. There may be many legal disabilities of individuals or corporations, arising from many different circumstances. (Insanity or infancy, for instance, would make it impossible for a beneficiary to accept.) But how about a municipality as beneficiary? It is generally true that a municipal corporation can accept gifts and trust benefits. But obviously it does not have the same

latitude as a private corporation, even though the latter is subject to its corporate charter provisions. Municipal corporation charters are more exacting.

As a means of acquiring public property, there is no magic in a trust. One must not be misled by the thought that a trust is nothing more than a gift. If the charter of a municipality provides specific procedure for the acquisition of a public utility, limiting it, we will say, to the condemnation method, specifying in detail the method of financing, and requiring, at some stage of the proceedings, a vote of the people, it seems pretty clear that that municipality could never acquire such a utility in violation of all of those provisions. That the property was coming to the city through the medium of a trust would make no difference.

Municipal utilities often have proved liabilities, not assets. Funds derived from taxation often have been required to operate or even complete paying for them. Repeatedly they have been sold at a loss by the public. But the nonprofit corporation as a medium of public acquisition of utilities presents a situation in which the alleged trust has many more objectionable provisions. The property is far from being paid for, and is subject to encumbrances of many different kinds.

Now let us attempt to formulate another simple hypothetical case. Let us suppose a group of citizens and a holding company get together and agree upon all of the terms and conditions upon which the holding company is willing to divest itself of the ownership of the common stock of a local utility. These terms and conditions show that the common stock will have to be paid for out of the earnings of the utility operating at its regulated reasonable rates, and requiring many years in the process of full payment. The agreement involves fixing the valuation of the entire property and the terms and conditions under which the entire property shall be paid for. This includes operating contracts with other utilities and with suppliers, etc., which control or affect the operations. Let us assume that the contract also directly or indirectly controls rates, by reason of the obligations assumed as to financing and operation.

Next, suppose that, pursuant to this agreement, these citizens organize a business corporation under *general* corporation laws, procure a loan sufficient to pay for the common stock, pledge it as security for the loan, acquire the common stock, execute all the contracts necessary to carry out the agreement in utmost detail, elect themselves or other

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citizens as the officers and board of directors of the utility. Then they amend their articles of incorporation to state that they will operate not for pecuniary profit (other than paying themselves for their services such sums as they may find appropriate), and declare their intention to turn over the property. The property will be turned over (subject to all these contract obligations) either to a specific city or to some public agency, or public body or political subdivision.

By the terms and conditions of this "trust" the public agency is required to acquire the entire property within a short period. During this period it is assumed that profits of the utility will be sufficient only to pay off a part of the cost of the common stock, but provide nothing for the purchase of additional ownership. To take care of that, the municipality will be obligated to issue bonds or to assume obligations, without a vote of its citizens. Through officers and directors selected by the city council, the city will operate the property as owner of the common stock until such time as it can arrange and can finance the purchase of the remaining value. This is the end of our rather long hypothesis. All right, the key question is: Has a valid trust been created?

We can assume, for argument, that the so-called nonprofit corporation is legal, and that it has the power to create a trust. But what does it own? It owns the common stock of a utility company. That is, it possesses the legal title, but almost no equity, because the stock has not been paid for.

It has attempted to create a trust not only as to this common stock (subject to conditions as to when and how it shall be paid for), but also as to the entire property (worth many times the common stock). Is this such ownership as will permit the creation of a trust? The question seems to answer itself. No.

Check back against our standards of a valid trust, listed earlier. There is no present and unequivocal disposition of property. Possibility of performance is dependent upon future and uncertain contingencies. There is no substantial equitable title to separate from the legal title. The unlimited discretion of the trustee is inconsistent with a trust. The beneficial interest is not only suspended but based on mere expectation.

Let us continue our check. Is the beneficiary of the trust sufficiently identified to permit of the creation of a trust? No, it is vaguely described as "any public agency, any public body, or any political subdivision." Who or what party then can step forward and prove, under such a setup, that it alone is the beneficiary of this trust? Again, until the political subdivision accepts the trust, no equitable title can vest in it. Obviously, then the corporation making the trust retains the power to decide at any future time precisely who the beneficiary of the trust will be.

Let us also ask, has the title to any property been bound to the alleged trust? No. The corporation has not parted with any property. It still retains entire control over it. Since no certain person can accept it, the corporation can modify or rescind its declaration of trust. At most, the trust would be "executory" in its nature. Even an agreement to create a trust is not enforceable if it lacks "consideration"—

True Intention of "Nonprofit" Corporation

"WHAT is the true intention of the 'nonprofit' corporation? A corporation, being a fictitious person, can have no intention of its own. It can only develop the purpose of the members—the incorporators —or those behind them. . . . Private individuals who have no financial resources whatever to put into the venture can hardly be anything but agents for others. The corporation which they create must, therefore, be the agency of others."

something of value given in exchange —to support it.

Even if the beneficiary were specific, it would be necessary to determine whether or not that beneficiary is *legally competent to accept the trust.* Acceptance could not be presumed, incidentally, on the part of a subdivision of the state. This city or other beneficiary would have to make clear its acceptance. If the terms and conditions of the trust involve an evasion of a city's charter, there could not possibly be a legally binding acceptance even if the city tried to accept. Further, public officers representing the subdivision would be required by law to exercise their own free discretion in determining whether the trust with all of its conditions would be desirable and beneficial to the subdivision they represent. We may conclude that the city or other subdivision does not have the power to accept the trust and that such acceptance cannot be presumed.

NEXT, there is the broader question as to whether or not such a trust is void as being contrary to public policy. This is the final and insurmountable obstacle. A trust, like a contract, must not cause an injury to the public, must not interfere with legislative action, or influence administrative action, or cause illegal delegation of the power of public officers, and must not interfere with elections. A trust created for the purpose of influencing the discretion vested in public officers (as to the manner in which they shall perform public duties), even though the result turns out to be a financial or other benefit to the public, is void as against public policy. Obviously, it is important to keep in mind that this is a fundamental point. It drives a sword through the very heart of the nonprofit utility corporation.

You can have an endless variety of real or pretended situations surrounding the nonprofit corporation. They all

amount to this: Private persons, instead of public officers, under the cloak of a pretended trust, predetermine all of the conditions, the prices, the commissions, the financing, the operating conditions. In the final analysis, the public must accept the judgment of self-appointed Messiahs. These Messiahs may be righteous, practical, and devoted to the public welfare; but any way you look at it, their nonprofit corporation setup is merely an illegal substitute for duly constituted public authorities.

Whatever their motives, their origin, or their program, they seek to act in the place of properly elected public officers, sworn to and accountable for their public duties. These Messiahs, in their corporate form, might be described as a new "third estate," or go-betweens, whose success is dependent upon pleasing both sides— the public buyer and the private seller—a sort of common-law wife, attached at the same time to two loving spouses and attempting hopelessly to be completely faithful at all times to both.

WHAT is the true intention of the "nonprofit" corporation? A corporation, being a fictitious person, can have no intention of its own. It can only develop the purpose of the members—the incorporators—or those behind them. In order to understand the purpose of the members, we must examine into the surrounding circumstances. Private individuals who have no financial resources whatever to put into the venture can hardly be anything but agents for others. The corporation which they create must, therefore, be the agency of others. Those "others" are, of course, the holding company, and the public power district or public committee which agreed upon and provided for the creation of the corporation. Their intention and purpose are the intention and purpose of that corporation.

Coming back now to the function and duty of the municipal officer, it is important to keep in mind that his so-called "discretion" is a legal, not a factual concept. In other words, it does not mean that the duly elected legal officer is necessarily a man of good judgment or superior ability. As a matter of fact, he may often have very poor judgment and ability. But it does mean that, under our system of government, he is the party legally responsible for making decisions. Public policy requires that somebody bear that legal responsibility, and the people have elected him, whether the choice was fortunate or otherwise. It follows from this that this responsibility or "discretion" cannot be abridged, or delegated, or encroached upon by self-appointed, non-elected, and, however well-meaning, citizens who want to tell him what to do. He legally cannot be placed in or cornered into a position where he has to "take it or leave it"—especially with respect to such an important matter as acquiring a utility property for the city. His discretion must not only remain free, but must extend to all the elements and details of such a deal. Any contracts or arrangement which would restrict his discretion to the mere opportunity to say yes or no, therefore, are violation of such public policy and accordingly invalid.

THIS situation is not altered by the coincidental fact that one or more individuals controlling the nonprofit corporation happen to be, at the same

time, themselves legal officers. If anything, it would be even more offensive to public policy, because it would amount to a public official seeking to avoid statutory responsibility or restrictions on his public acts by acting in the capacity of a private citizen not subject to such statutory obligations. It is well settled that public officers can neither avoid their obligations (by subterfuge or otherwise) nor delegate their powers to others.

In the situation before us, we could even have an attempt at a double delegation of power. The public officers, hedged about by contracts and commitments made in advance by the nonprofit corporation, would have delegated it to the members of the nonprofit corporation.

The latter in turn would have delegated their powers to officers and directors of a private utility corporation desiring to sell its common stock. And these latter, under the law, owe their allegiance to all classes of security holders of the utility corporation and perhaps to its customers. This appraisal of double delegation of power (to conflicting interests) assumes that we respect the formal independence of the two corporate entities. But if, on the other hand, we drop the corporate veil (or "disregard the corporate fiction," as the lawyers say) we find, in actual association, public officers sharing their duties and powers with private citizens, some members of the nonprofit corporation, and some officers of a utility corporation. Certainly no valid trust would be declared in favor of *both* the public and the private company. Yet, to favor one would violate some allegiance to the other. Would any court tolerate such a potpourri of conflicting interest as the effective vehicle of a interest as being the effective vehicle of a trust?

PERHAPS the absurdity of the situation would be more apparent if we were dealing with a simpler transaction than acquiring a utility with its complicated security interests. If a public-spirited group of private citizens went out and made the down payment on a piece of expensive fire-fighting equipment for the city, we would have a little clearer example. We know very well what would happen when such a group declared that it was holding the equipment in trust, to be turned over to the city, if, as, and when the city accepted and performed all the various terms (including payments on the balance due over a number of years) of the conditional sales contract made for it, in advance, by our group of public citizens. This would be merely a pretended offer to create a trust if the

¶ "WHETHER *public ownership of utilities, generally, is beneficial to the public is . . . a very controversial subject. In this country, we have, on the whole, been following the democratic course of letting local communities decide this issue for themselves. And it is when we thus move from the abstract theory to the concrete proposition of acquiring a particular utility property that claims and counterclaims are brought more sharply into focus.*"

beneficiary will pay for it. No court would hold that the city could accept or be bound by such an arrangement, even if its officers were willing to do so. It makes no difference that our group of citizens was only trying to secure adequate fire protection for the city, or that the same was actually needed. Well, these same principles apply whether we deal with electric, water, or gas properties, transport, communications, parks, buildings, ports, docks, or whatnot.

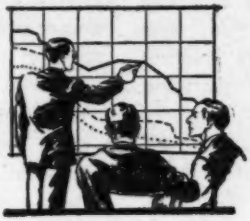
The case of the nonprofit corporation becomes worse if its deliberate purpose or necessary effect is to evade lawful restrictions upon the power of the city. Obviously, if a city could not lawfully do certain things, it could not lawfully create an agent (in the form of a nonprofit corporation) to do them for it. Nor could it accept the results if they were accomplished by a volunteer organization (which it did not create).

IN other words, if it could be shown that the purpose of the transaction was to avoid a statute barring direct acquisition, or restricting the issuance or sale of bonds or other financial arrangements by the municipality, or to evade taxes or debt limitation, or to interfere with the city's power of eminent domain, and so forth, then the corporation's basic legal existence would be open to question. Upon such a showing, the courts ordinarily would enjoin the corporation from further operations, generally, and appoint a receiver to administer its affairs with the object of dissolution. Under some circumstances, a "constructive trust" might be declared in favor of the public, if the beneficiary could be sufficiently identified; but, in any event, the members of this corporation would have to give an account of themselves and the details of their arrangements.

Whether public ownership of utilities, generally, is beneficial to the public is, of course, a very controversial subject. In this country, we have, on the whole, been following the democratic course of letting local communities decide this issue for themselves. And it is when we thus move from the abstract theory to the concrete proposition of acquiring a particular utility property, that claims and counterclaims are brought more sharply into focus. Let us consider this issue, therefore, not on the merits of whether public ownership is desirable (a question outside the scope of our discussion), but from the specific approach of whether acquisition of utility property may well have other legal consequences which might invalidate our nonprofit corporation plan for municipal acquisition.

THE claim, for instance, that such property pays for itself, without the use or involvement of public credit, is unsound. No utility property can be acquired without the city assuming some liability or risk. This risk continues throughout the period of operation, even after the property has been acquired.

Another important point, injected by the public ownership angle, is whether the operation of a utility business can ever be considered, by its very nature, a nonprofit enterprise. If the nature of the business is repugnant to the claim of nonprofitable enterprise, then our so-called nonprofit corporation is in reality operating for a pecuniary profit. And, if this is true, its incorporation is illegal and it can have only a *"de facto*



Operation for Profit

"ANY ordinary private business corporation can give part or all of its earnings to the public, to charity, or to further noble enterprise. But it must operate at a profit in order to have anything to turn over. So when our nonprofit corporation confesses it is operating so as to apply current earnings of a utility system to the purchase price of that system, the profit motive and profit dollar stick out like sore thumbs."

existence," subject to legal attack and dissolution, as already described.

It is my opinion that any corporation which has for its objective the purchase of a public utility, to be paid for out of the proceeds of its operation, cannot be a truly nonprofit corporation. This, regardless of the trust it purports to create in favor of the public, including the turning over of all earnings. An operating profit is a profit no less, because it is turned over to someone else.

If the municipality itself bought and operated a utility under such conditions, it would be obviously operating for profit. Even if it operated at cost, the venture would be for the pecuniary benefit of its citizens. Why, then, is the nature of the business any different simply because it is conducted by a corporation which professes to be a nonprofit organization? Merely operating for enough profit to pay for the balance of a purchase price is certainly enough to stamp the venture as profitable.

FURTHERMORE, just how far does this profession of "nonprofit" status go in establishing the real character of the operation? Let us look beyond the high-sounding phrases about everybody concerned being devoted solely to public welfare. The nonprofit corporation says, in effect, "Our objective is to make profits for the city in which we live." Is this not, in itself, an admission that the operation is intrinsically a venture for profit? Any ordinary private business corporation can give part or all of its earnings to the public, to charity, or to further noble enterprise. But it must operate at a profit in order to have anything to turn over. So when our nonprofit corporation confesses it is operating so as to apply current earnings of a utility system to the purchase price of that system, the profit motive and profit dollar stick out like sore thumbs.

A nonprofit status for a corporation (in the legal sense) must never be con-

fused with mere failure of a corporation to make profits. Many a struggling business corporation goes year after year without actually making profits through no fault of its own and in spite of its best efforts. This, of course, does not give it any of the advantages of a nonprofit corporation under the law. The reason is, obviously, because the business corporation is striving to make profits—would make them if it could. It is this organization and purpose, and incentive to make profits which are controlling — not whether profits are actually made.

AND so, conversely, no corporation may lawfully conceal the intent of ultimate profit and obtain the advantages of a nonprofit status during the promotional years, when profits would not be likely to occur anyhow. Otherwise, you and I could start a new business—any kind of business—and say, "let us be a nonprofit corporation *until* our earnings pay for our factory, expand it, and accumulate surplus." Then, we might agree to change over to a business corporation by merely amending our charter, or transferring the business to a new corporation, and thereafter start cutting up the melon. Needless to say, the courts and the tax collector would step in fast if any such obvious masquerade were attempted.

Let us proceed now to some case law to illustrate the general principles we have been discussing. The Chicago Street Railway Case has already been mentioned.[1] There the courts held that the "Street Railway Association," despite the attempt to declare a public trust, could not be regarded as a nonprofit corporation. As in more modern situations, it was found there that pecuniary profit was to accrue out of the property which the corporation attempted to hold in trust for the public.

In a Delaware case,[2] the court held a mere declaration in a certificate of incorporation was not enough to stamp upon it a nonprofit character, and that it could not have such status where the operating scheme allowed profits to accrue to the corporation, although not in the form of dividends to members. Likewise, a Colorado case,[3] after citing the Chicago Street Railway Case, held that "a corporation which was but one incident in furthering the business objective of the incorporators may not organize and operate under the nonprofit act." Also of interest is an Ohio case[4] where the court voided the charter of a corporation organized for the purpose of assisting its members to buy real estate on long-term easy payments, without ostensible profit to itself, but with the objective of aiding the "working classes."

IN a New York case[5] an allegedly nonprofit educational corporation was held to have a profit status where its investment in a school could be returned to its members upon ultimate dissolution of the corporation. In another New York school case[6] the mere assumption of debt obligation of an insolvent corporation for profit by the avowed nonprofit corporation was held

[1] People ex rel. Bonney *v.* Rose (1900) 188 Ill 268.

[2] Read *v.* Tidewater Coal Exchange (1922) 13 Del Ch 195.

[3] International Service Union Co. *v.* People ex rel. Wettengel (1937) 101 Colo 1.

[4] State *v.* Home Co-op. Union (1900) 63 Ohio St 547.

[5] People ex rel. Rye Country Day School *v.* Schmidt (1935) 266 NY 196.

[6] Lawrence-Smith School *v.* New York (1938) 166 Misc 856.

to forfeit the tax exemption of the latter.

Closer to the utility field is another Ohio case[7] which held that the nature of a telephone business serving the public voided the pretense of a "mutual" telephone company to a nonprofit status, even though it claimed to operate without profit and serve only its members. Still closer to our own utility situation was a Kentucky case[8] involving steam railway operations in that state by the city of Cincinnati. Pointing out that the city as owner and operator of the railway furnished usual transportation service at usual charges, the court held that it could not be considered as entitled to a Kentucky tax exemption for corporations not organized or conducted for pecuniary profit. In much the same way, the supreme court of Ohio recently held that the municipally owned street railways of Cleveland are not tax exempt because operated for profit, even though all "profit" is being applied against the purchase price.

In a Washington state case[9] the court rejected the claim to a nonprofit status of a corporation set up to contract for doctors and hospital services for the employees of the incorporators. Significantly, the court pointed out that a "profit does not necessarily mean a direct return . . . A saving of expense which would otherwise necessarily be incurred is also a profit . . ." This same idea is expressed in a Pennsylvania case[10] where the corporation seeking merely to provide mutual exchange of shop management information between Chevrolet dealers in Pittsburgh was denied a charter as a nonprofit corporation.

IN another school case from Florida,[11] the mere charging of tuition fees for services rendered and the production of a livelihood for teachers and school officials was held to stamp the venture as an organization for profit not entitled to tax exemption. More recently we have a Federal case[12] in which tax exemption was denied to the National Board of Fire Underwriters, although it claimed to be a nonprofit corporation which had never declared a dividend and whose purpose was simply to carry on research work as to insurance risks for the mutual benefit of the insurance company members. The court observed that "the primary concern of the petitioner was that of its membership, made up almost en-

[7] Celina & M. County Teleph. Co. *v.* Union-Center Mut. Teleph. Co. (1921) 102 Ohio St 487.

[8] Cincinnati *v.* Commonwealth ex rel. Reeves (1942) 292 Ky 597.

[9] State ex rel. Troy *v.* Lumbermen's Clinic (1936) 186 Wash 384, 394.

[10] *Re* Pittsburgh Chevrolet Dealers' Application for Charter (1929) 296 Pa 431.

[11] Miami Beach College Corp. *v.* Tomlinson (1940) 143 Fla 57.

[12] Underwriters' Laboratories *v.* Commissioner of Internal Revenue (1943) 135 F2d 371, 373.

¶ "A NONPROFIT *status for a corporation (in the legal sense) must never be confused with mere failure of a corporation to make profits. Many a struggling business corporation goes year after year without actually making profits through no fault of its own and in spite of its best efforts.*"

tirely of insurance companies . . . This does not sound like charity to us. If it is charity, it began at home. It was not the public interest that prompted the establishment of the petitioner."

Most interesting was a Delaware case[13] involving an ingenious effort to obtain the advantages of a nonprofit corporation by a social organization known as the Decimo Club. To become a member of this club, an applicant also had to become a member of a corporation called the "Decimo Trust of America," which issued a certificate of beneficial membership in the assets and income of the trust. The court considered of very great importance a provision that upon the dissolution of the Decimo Trust all assets became property of the Decimo Club—not its individual members. The court pointed out that the situation, therefore, was simply one where money would be collected from club members to be invested for profit-making purposes.

The court thereupon gave the following blunt appraisal of the situation:

> Looking through the technical aspects of the scheme . . . the whole scheme appears to be a subterfuge by which the defendant, incorporated as a no-profit concern, seeks to accomplish as one of its chief purposes the end of earning pecuniary profits for its members, keeping control all the time over the operations of the venture and ultimately merging in plain view as the absolute owner of the profit-seeking enterprise.

The Decimo Club Case brings home the fact that the circumstances surrounding the organization of the nonprofit corporation may be of importance in determining its true character.

A FINAL word of warning about certain so-called revenue bonds which should not be accepted by responsible investors without careful scrutiny of legal angles. This type of bond may be issued by a municipality (or other public agency) which has reached its legal debt limit. Such bond is not, therefore, a general obligation. Further, it is not even payable out of earnings of municipally owned property. The bondholder may look only to operating profits from a privately owned utility which the nonprofit agency has contracted to buy with the proceeds of the loan. In short, this is an effort to capitalize anticipated profits of privately owned property.

Such a bond pledges neither city property nor city earnings. Although offered as a public security, its own terms recite the denial of city liability. By what right does a city thus borrow money to turn over to a private agency for the assignment of a contract described? Even the tax-exempt feature,[14] principal attraction of all public issues, is doubly threatened in this case: (1) the recent U. S. Supreme Court decision in the Saratoga Springs Case —validating a Federal tax on state-owned business activity; (2) the decision of the Missouri Supreme Court in State *v.* Brown, 92 SW2d 718 (1936) which denied a tax exemption to a private agency (despite its claim to public status) because the state would not own a beneficial interest in it until the bonds were paid off.

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[13] Attorney General *v.* Decimo Club (1928) 16 Del Ch 183, 196, 197.

[14] Incidentally, the public should not rely on proposals to enlist local support (while enjoying Federal tax exemption) by making state and local payments "in lieu of taxes." Where a state has self-executing laws establishing tax exemption, such indirect payment has no better standing than direct payment. Lower Colorado River Authority *v.* Chemical Bank & Trust, Texas Supreme Court, November 3, 1945.

Bow-wow, Mister Meterman!

The dog's side of the old story of the patch out of the seat of the pants, as interpreted by a veteran trainer and handler of dogs.

AS TOLD TO BRUCE McALISTER

I'M just an average dog, Mister Meterman. I live with an average family, in an average house, in an average American city. I'm not pedigreed. I'm not too smart, nor too dumb—for a dog. I'm not likely to be any too well trained. I have my off days, especially dark or stormy days.

But like any other average dog, I'm doing the best I know how, Mister Meterman. Please keep that in mind. You may be the best guy in your company's books; yet I'll bet you a ham bone the average family dog has just as much loyalty and devotion to his job as you have to yours.

I'm not just trying to start an argument, M. M.; but do think this over. It might give you a more tolerant view about the dog's side of the story. I've got my job to do. You've got yours. The smart thing for both of us would seem to be to avoid conflict and misunderstanding. Then we can both go about our business without bothering each other. Okay, M. M.?

I'll admit you've probably had some tough experiences if you've been a meterman or repairman or telephone installation man very long. Chances are you've been nipped and clipped and barked at, to distraction. Chances are you've wondered why, in tarnation, dogs act so ornery, why they don't get more sense. Worst of all, you might be growing into a dog hater. Don't let it do that to you, M. M. It's the worst thing that could possibly happen to you—turning into a dog hater. That's only a dog's viewpoint, of course.

The main trouble, I think, in misunderstanding dogs is to generalize and assume universal rules—to assign a classified reaction or characteristic to the whole dog-gone race of dogs. You hear it in conversation every day, even from dog lovers; in fact, *especially* from dog lovers. Dogs do this, dogs do that, they say—as if the whole genus of *canis familiaris* (pardon my dog latin) performed as precisely and as predictably as so many Ford automobiles or Golden Bantam corn seeds.

Truth of the matter is, M. M., dogs have *at least* as many varieties of character, disposition, and temperament as

the entire living human race—probably more. Consider, for instance, that there are actually many more breeds of dogs than there are races of mankind. Dog dimensions, coloring, body covering, etc., vary more widely than man's. Weight alone may differ from a few ounces for the Mexican hairless to upwards of 200 pounds for the Irish wolfhound.

A FEW general rules about dog behavior are fairly valid, as we shall see in this tale of a dog (no pun, please).

You are probably already asking the inevitable question: What types of dogs have nastier dispositions and which have the friendlier temperament? No satisfactory answer can be given to this question because all dogs bite, all of them can be provoked. Then, too, there are so many factors to be weighed—the dog's training and the surrounding circumstances, especially—that no rule could ever be formulated on the basis of dog breeding alone which did not have so many exceptions as to be meaningless. Besides, we must recognize that only a small fraction of average house dogs is of so-called pure breed, or anything like it.

By and large, and very roughly, we may observe that the larger types of dogs are less inclined to be excitable or snappish—in the first instances, at least—than the smaller dogs. The reason for this is probably because the dog has for centuries tried so hard to imitate mankind. It is commonly observed among men that the small fellow is, on the balance, more likely to be the aggressive, plucky, "on edge" type, while the taller, bigger fellow is more likely to be reserved—the strong, silent type. Psychologists explain this to the effect that the smaller fellow, conscious of his diminutive stature, feels recurrently called upon to demonstrate that he will stand up for himself, while the big fellow just takes this for granted.

ANYHOW, it's often that way with dogs. A tiny terrier as big as a nickel's worth of soap, and able to hide in a rat hole, will often begin yapping at nothing, and snapping at anything he sees; while the great big lazy mutt of shepherd strain will sleep straight through an air raid. Significantly, it is the noble St. Bernard, one of the largest of all dogs, which has the deserved reputation for kindly temperament and gentle manners. Newfoundlands, shepherds, airedales, and even the larger hounds and mastiffs (not likely as average house dogs) commonly have surprisingly agreeable dispositions, despite their spectacular size and ferocious appearance.

But this is no safe rule, M. M. It's no rule at all. There's many a big chow or collie as mean as sin. In fact, it's just as well to throw out breeds, or mixtures, as any criterion for a dog's hostility to strangers. We must also observe in passing that the smaller dogs are not necessarily meaner in disposition. It would be fairer, perhaps, to say that they are often merely more excitable, more sensitive to strange noises and sounds, than their big cousins, who feel surer of themselves because of their very size.

Ordinarily, a dog's training and general environment have more to do with his behavior than his ancestry. Country dogs, or those closely confined because of apartment living in very large cities, are likely to be more suspicious of

strangers than dogs in small or medium-sized communities which habitually run around loose. The obvious reason is that the small-town dog or "neighborhood pet" gets accustomed to meeting different people, while the open-country dog does not, and the big-city dog is always kept confined.

It is a surprising fact, however, that a large amount of mean disposition and nastiness among house dogs is due to *boredom*. That's right — boredom. The average dog likes to work, to help his master, to make himself useful. He is most happy when he can put in a hard, full day tending sheep, hunting, retrieving, or even pulling a milk cart. A dog kept occupied in this manner is not likely to be nervous, temperamental, or fretful. He sleeps and eats well and feels he is earning his keep.

But, unfortunately, most dogs are kept around just for pets. The only job assigned to them is that of volunteer watchman. Is it any wonder then that they try to make the most of it, work at it overtime, and often overdo it?

Here again, dog imitates man, his master. He tries to make the only job he has seem important—to make quite a fuss about it, to impress the "boss." "Apple polishing" is what humans call it. All dogs, M. M., are natural born "apple polishers."

Also, they, especially yard dogs, teach each other bad habits. One screwball dog, barking at every butterfly that passes, can soon get every dog in the block almost as scatterbrained as he is.

And so we have the typical case of the bored dog with nothing to do all day or night except to eat and sleep, chase an occasional cat, and watch the place, and nothing ever happens, it seems.

He gets like a fire-starved fireman after a while. Just at that point, M. M., you loom on the horizon with your frightening flashlight and hurried movements. Can't you just visualize poor Fido, welcoming this chance for excitement and taking after you, even though there may be some doubt in his mind that you are on the level. A little patience and training by the master would correct this. But you can't do anything about that, M. M. And neither can the dog.

All right then, let us take the situation as we find it. What can you do to protect yourself, your company, the customer, and his dog from unnecessary complaints? I have outlined here (after considerable research and consulting with quite a few wise old dogs

¶ "Ordinarily, *a dog's training and general environment have more to do with his behavior than his ancestry. Country dogs, or those closely confined because of apartment living in very large cities, are likely to be more suspicious of strangers than dogs in small or medium-sized communities which habitually run around loose. The obvious reason is that the small-town dog or 'neighborhood pet' gets accustomed to meeting different people, while the open-country dog does not, and the big-city dog is always kept confined.*"

of my acquaintance) ten suggestions for you to follow as outlined on page 217. Under each is a little explanatory detail. Here goes, M. M., and thanks in advance—on behalf of all dogs—for your kind consideration. It's been dog-gone swell of you to read even this far.

1. IF *the folks are home, have the dog confined.* That's the safest way, even though the dog appears friendly, and you might feel tempted to make his acquaintance. The customer is not going to resent it if you make the request tactfully. But the approach is quite important from the angle of your company's public relations. Remember, dog lovers are the most softhearted sentimentalists in the world. You can make a friend or an enemy for life by just a remark about the customer's dog.

For example, suppose you say in a surly fashion, "You've got to tie that mutt up, lady, or I'm not going down that cellar, see!" Chances are the lady will oblige reluctantly and really feel more disposed to sick the dog on you. (From the dog's point of view I think that suggestion would be quite justified.)

On the other hand, suppose you say with a smile, "That certainly is a handsome dog, lady. I'm just wondering if you wouldn't mind calling him up while I'm down there reading the meter; sometimes the flashlight frightens them." Even though the praise were bestowed on a flea-bitten mongrel (in fact, especially if it were a flea-bitten mongrel), the owner would glow in your implied compliment to her possession and your solicitude for the dog's comfort. Try that line consistently and see how many firm friends you make for your company over a period of time. Rate arguments, politics, and other issues, notwithstanding, I say again: Dog lovers are notorious sentimentalists. Why not turn it to the company's advantage?

2. IF *his owner is not at home, ignore him,* PROVIDED *he ignores you.* The average house dog will generally let you know right away that he is at home. If you are a repair- or maintenance man whose business makes it necessary for you to go on the premises notwithstanding the owner's absence, don't take the barking too seriously. Barking is the sign of normal dog reaction. A silent dog is more likely to be sick or really vicious. If the dog makes no attempt to follow up by approaching you and merely satisfying his curiosity to the extent of approaching, just so far to see what you are about—let it go at that. Such a dog is not likely to harm you.

3. MAKE *friends only if he feels like it, and if you do too.* You can't fool a dog about such things. If you are really afraid of a dog's presence, he knows about it just as soon as you do yourself. You can't bluff it. Scientists have speculated that a person in fear exudes certain odors which the dog detects. Anyhow, he *knows.* If you try to bluff confidence by making an attempt towards friendliness under such circumstances, you're quite likely to get nipped. A dog wouldn't understand it.

On the other hand, if you are really a dog lover and the dog looks as if he might be friendly, and your duties require you to be around a little while, it

Ten Suggestions for Utility Employees In Dealing with Customers' Dogs

1. *If the folks are home, have the dog confined.*
2. *If his owner is not at home, ignore him,* PROVIDED *he ignores you.*
3. *Make friends only if he feels like it, and if you do too.*
4. *Let him make friends first; don't try petting him right off.*
5. *To make friends, stand quietly, put out your hand, and let him smell it.*
6. *If he sniffs and walks off, or refuses to sniff your hand, let him alone.*
7. *Act as quietly and confidently as if you had a right on the premises; avoid sudden or suspicious motions or noises.*
8. *If the dog threatens to attack,* FACE HIM DOWN, *then back away slowly —never* TURN YOUR BACK OR RUN OFF.
9. *If the dog attacks, defend yourself with a stick or other object, if possible (avoiding direct use of hand or feet); charging* TOWARD *the dog will get better results than retreating.*
10. *In case of any dog bite fracturing the skin,* ALWAYS *notify your company or local police and follow instructions.*

might be pleasanter if you tried to make friends. But, to repeat, don't try it unless you feel like it. *Never* try it on a bitch with pups around.

4. LET *him make friends first; don't try petting him right off.* It is a fact that very many more dog lovers are bitten trying to pet strange dogs than folks who don't like dogs. They are the victims of self-confidence and perhaps a little self-conceit, springing from the impression that they can make friends with any dog. That is all wrong. Aside from the fact that dogs have an inherent sense of dignity which human beings fail to recognize, they also have a strong sense of loyalty to their owners which makes them bristle at any attempt of strangers to tickle their ears or indulge in any other marks of affection reserved for their masters. This is especially true of so-called "one-man" dogs, such as the famous "seeing-eye" variety which has been trained to protect a blind master and remain in his company almost constantly. A stranger trying to pet such

a dog without at least the formality of an introduction is just as offensive to him as a strange man trying to take liberties with a respectable woman. That might seem like an extreme parallel; but it is the way the dog feels about it.

5. To *make friends, stand quietly, put out your hand, and let him smell it.* There is a reason for every action suggested here. Standing quietly allays the dog's fears. Facing him shows you are not afraid even though he already knows that. Putting out your hand shows you want to be friends and are not harboring any hostile intentions. Above all, never approach a dog from the rear. When he is making the first advance he is very skittish and doesn't want to feel fenced in. The open hand is the best approach.

6. If *he sniffs and walks off, or refuses to sniff your hand, let him alone.* This almost speaks for itself. The dog is simply telling you that you might be all right but he is keeping an eye on you; also, he isn't making friends that day. If you don't bother him further, chances are you won't have any more trouble under those circumstances.

7. Act *as quietly and confidently as if you had a right on the premises; avoid sudden or suspicious motions or noises.* This also speaks for itself. Most people don't know it, but a dog is actually a conservative. He likes the established routine, not strange or upsetting experiences (such as house cleaning), or anything revolutionary. If dogs could vote they would probably all go solidly Republican.

For this reason a dog is not likely to get upset if you go about your business as though you had every legitimate right to do so. Chances are he has been used to his master's friends and other people calling at the house, so if you act respectable he is likely to treat you as such. It is only the unexpected—the departure from routine—which upsets him. If you drop a tool, for example, pick it up slowly, don't grab for it or he is apt to grab for you.

8. If *the dog threatens to attack,* FACE HIM DOWN, *then back away slowly —never* TURN YOUR BACK OR RUN OFF. I know this goes contrary to human nature, which is to take it on the lam whenever you see a dog heading toward you with fire in his eye. But again we must remember that dog imitates man, and, therefore, is something of a bully. As sure as you turn your back and run, it is just as natural for him to take out after you with everything that he's got as it is for you to try and make yourself scarce. The result is a foot race, and unless you're in pretty good shape you're likely to find the dog is faster than you are. If, on the other hand, you stand perfectly still and face the dog, almost invariably he will stop and hesitate. This is what dog handlers call "facing down" a hostile dog. The only exception to this rule of procedure would be in the case of an obviously mad dog or a trained killer dog, and you are not likely to meet either—let's hope not, anyhow. The statistical chances are about the same in meeting a mad dog as meeting a venomous snake.

In "facing down" a dog you stand motionless for as much as a minute. Chances are good that the dog will

stare at you and then retreat. If so, you have licked him psychologically and he is not likely to bother you, but don't follow up the advantage. Leave him alone.

If, however, the dog should "freeze" and continue to glare at you for more than a minute, you'd better start backing away slowly, always keeping your face to the dog.

In the process of "facing down" a dog, try giving him commands, such as "go away" or "lie down," in a calm and authoritative voice. If, for obvious reasons, you can't manage a calm, authoritative voice at the moment, better not try it because an apprehensive squeak might make him even more upset. Chances are he won't obey you anyhow, but it's worth trying. The rule about never turning tail and running can, of course, be modified, if you see a dog charging from some distance and you are only a few feet away from a picket fence you can easily jump. But you'd better be a pretty good judge of distance. You will also find that dogs are pretty good respecters of other people's property. They seem to know the property line just as accurately as if they'd read the deed. Unless you beg them by turning tail and getting them in full pursuit, they will rarely ever chase you over the public highway.

9. IF *the dog attacks, defend yourself with a stick or other object, if possible (avoiding direct use of hands or feet); charging* TOWARD *the dog will get better results than retreating.* In the process of backing away, as noted above, you might keep your eye peeled for a stick and slowly reach for a tool or other object in your clothing. The reason for using an object preferably to defend yourself is because it is dog's nature (except, again, in the case of a really mad dog or a trained killer dog) to go for the moving member of your body. If you try to push him away with your arm, your arm will get nicked. If you try to kick him, your calf will get it. And, of course, if despite the above advice, you yield to the temptation of turning around and running, it is the old story of the seat of your pants, which is the most accessible target. If you use a stick, you'll distract the dog and he might even take out his bites on the stick itself, because—aside from the possibility of injuring the dog—dogs usually respond to disciplinary blows about their body, while a blow in the face might enrage him further. A well-aimed blow at the flank will often slow up the toughest, meanest animal, if not put him out of action. Of course, an inverted chair, ladder, or other pronged object held off, "lion-tamer fashion," is an excellent shield. But in this spot you will not often get the chance to pick your own props.

There are no hard and fast rules

¶ "IT *is a surprising fact . . . that a large amount of mean disposition and nastiness among house dogs is due to* BOREDOM. *That's right—boredom. The average dog likes to work, to help his master, to make himself useful. He is most happy when he can put in a hard, full day tending sheep, hunting, retrieving, or even pulling a milk cart.*"

for determining just when a dog is going to attack. It is often said that a dog will lower his head before bringing up for an assault. It is also commonly said that a dog will lay his ears back before getting down to business. Long-tailed dogs frequently lower the tail before making the lunge. There is some element of truth in these observations, but the exceptions are so frequent they are not safe. About the only safe generality is that nobody was ever attacked by a dog while the dog was sitting down. Even the wagging tail is no infallible criterion of a dog's friendliness. I have seen a Dalmatian go into bitterest action while wagging his tail and with perked ears as if he were greeting a long, lost friend.

10. In *case of any dog bite fracturing the skin,* ALWAYS *notify your company or local police and follow instructions.* Most utility companies have established procedure for taking care of the case from then on. Many local authorities also require reports which the company will probably take care of. But if it is a small company or one which, for some reason or other, does not have rules, the bitten party should report his injury to the police authorities on his own initiative. They will then probably send an observer to examine the dog on the possibility of rabies. Nine hundred and ninety-nine times out of 1,000 there will be no rabies for the simple reason that confined house dogs usually do not contract the infection, which is more prevalent among running dogs. A trained observer can usually tell at a glance within a day or so whether the dog is really mad or simply provoked. In case of any doubt, however, the authorities will take the dog into custody for closer observation. If it should develop that the dog is mad or there is even some suspicion that he might be—it is necessary to start immediately with antirabies injections. The authorities will take care of destroying the dog under such circumstances. In this respect, it is important to keep in mind that rabies is 100 per cent fatal in human beings if the infection is permitted to reach a truly virulent state before preventative measures are undertaken.

One last word about unnecessary destruction of dogs. In some communities, local laws or regulations permit the destruction of dogs which have bitten people, even though the dog is in good health. This poses a problem of public relations which any smart utility company will recognize at once. Not long ago one of the large independent telephone companies in the South was saved from making a terrible blunder through the alert action of one of its officials in the case of a repairman who had been bitten by a seeing-eye dog. After all, the dog was only doing what she had been trained all her life to do —protect her blind ward. If the company or its employee had actively pressed for the destruction of such a dog, the resulting publicity might have caused widespread public reaction. Fortunately, company officials were shrewd enough to turn the situation to their advantage by taking active steps to see that the dog was returned to its owner unharmed. In other words—to paraphrase the old gag about the piano player in the old Wild West saloon—don't shoot the house dog unnecessarily. Remember he's doing the best that he can.

The Right Job for the Man

Improved civil service procedure undertaken by the Los Angeles Department of Water and Power, a far-reaching and constructive move, in the opinion of the author, toward the alleviation of employee-management controversies.

By C. ERNEST HILL

One of the most far-reaching and constructive moves toward the alleviation of employee-management controversies has been undertaken recently by the department of water and power, Los Angeles, California, whose personnel now runs into some six thousand and may shortly be augmented by an additional thirty-five hundred if contemplated plans are actualized. This huge public utility has recognized at last the tremendous economic losses sustained because of dissatisfaction and discontent on the part of employees due to certain civil service regulations and salary restrictions.

With an eye to postwar economies which could reconcile the rising demands for increased wages and shortened working days, department commissioners and executives have conceived an ingenious plan which, when successfully carried out, may completely revolutionize the entire civil service operations of the city—perhaps even of the nation.

Graying top executives of a previous generation, who had long controlled department policies by virtue of a fading renown as builders of the famous Los Angeles aqueduct, naïvely viewed their employees from a pinnacle of feudal superiority. In consequence, a deplorable state of morale had developed among employees. They no longer were willing to remain mere animated machines, accepting unquestioningly the dictum of their masters.

This condition was aggravated by growing dissatisfaction with conventional civil service methods of selection and placement of applicants—methods which few can doubt are not only economically ineffectual, but conceivably predatory to the best interests of public service personnel. To assign salary ranges to jobs as a class, without reference to specific job requirements and skills, enforces a regimentation upon a large percentage of the nation's wage earners, expensive as it is unfair.

Such hazards to maximum produc-

tion in a postwar economy were readily comprehended by the newer, up-looking department executives and an effective antidote was sought. They realized, too, that any remedial methods they might undertake must necessarily include a general "interim raise" in pay and a fairly broad "in-service-training" program.

IN instituting the newly conceived plan, it was recognized that certain within-the-department obstacles to a successful culmination were sure to present themselves. Principally, these consisted of suppressed suspicion on the part of employees when approached, and their fear of recriminating reprisals. Unless complete confidence and full coöperation could be secured from them, there was little hope of carrying out the plan to a satisfactory conclusion. And it could run into a vicious circle which could cost a lot of public money and get nowhere.

It cannot be assumed that the plan, as conceived and made workable, was motivated by purely selfish aims, nor is it probable that wholly altruistic incentives were behind the suggested remedy. While an observer may not look into the mental and spiritual sanctuaries of those responsible for initiating the plan and objectively discern the secret "springs of action" which gave it tangible form, he must inevitably conclude, from all available evidence, that there is a happy blending of the mundane and the benevolent — a conscientious desire to produce within the department full value for every dollar of rate money expended and at the same time do full justice to individuals comprising the personnel of the department.

TO disregard vocational trends and attitudes of temperament in the placement of applicants for civil service positions—or in private enterprise, for that matter—is to fall far short of insuring even 50 per cent efficiency in getting something done. Unfortunately, most people make a wrong approach to occupational employment. They see it only as a means of making a living, rather than as a profitable and pleasant device for *living a life*. When the careers of men and women of great achievements in all walks of life are viewed analytically, there can remain little doubt in the mind of anyone that the successful arrival at a constructive goal, after all, is the purpose of being, and that the finding of one's lifework and effectively carrying it out is a far greater incentive to a useful life than a mere "work-to-live" motive could possibly justify. A man is truly happy when he suddenly discovers himself in his work.

The degree to which this philosophical viewpoint has influenced the department executives in attempting to provide better working conditions and happier employee - management relations can only be conjectured. But the results that are sure to follow this constructive and comprehensive survey now under way will more than justify the ideas and ideals which lie behind it, whatever they may be.

I had a chat with one of the appointed analysts, a department employee, who was kind enough to supply me with the factual material contained in this article. He is most enthusiastic in regard to the possibilities of the survey, and the many objectives he and his associates hope will result.

Consideration of Vocational Trends

"To disregard vocational trends and attitudes of temperament in the placement of applicants for civil service positions — or in private enterprise, for that matter—is to fall far short of insuring even 50 per cent efficiency in getting something done. Unfortunately, most people make a wrong approach to occupational employment. They see it only as a means of making a living, rather than as a profitable and pleasant device for LIVING A LIFE."

As outlined by the department, the new plan means:

1. A CAREFUL survey of jobs, skilled and unskilled, covering a cross section of the complete industrial and commercial field, throughout the war-expanded production area of Los Angeles and vicinity, to be conducted by a reputable firm of statisticians. The purpose of this phase of the survey is to determine the prevailing wage scale for various types of work throughout the area.

2. AN accurate analysis of every position in the department, to determine what each one now requires of the employee in the way of production and competency, as viewed by the immediate supervisor in charge and by the employee filling the job. This portion of the survey is to be made by specially qualified and trained employees of the department. To quote from *Civil Service Sentry:* "The supervisor is asked to describe orally and in detail the duties, responsibilities, and requirements of the position, after being informed that the rough-draft description resulting from the interview will be submitted to the employee currently filling the position for his criticism and suggestions as to its factuality."

The employee filling the job to be analyzed is not required to make a written description of his own position. A copy of the rough-draft description, orally made by his supervisor, is handed to him for his frank, unrestrained criticism and reaction; and an oral delineation of the manner in which he is carrying out the requirements of the job as he understands them is solicited. He is informed, of course, that he need not restrict his remarks or soften his criticism out of fear that his differing viewpoint might bring about reprisals or persecution by his supervisor.

In each case, the final draft of the job description prepared by the analyst must be mutually satisfactory to the individual occupying the position and the immediate supervisor—the two people in the entire department who should have a correct and coinciding comprehension of the job itself.

3. The board of water and power commissioners, by authority vested in it by the provisions of the city charter, contemplates setting up each position individually, specifically stating the requirements and responsibilities, and stipulating the applicable wage or salary which shall compare favorably with the local prevailing pay for similar work. This will mean a revision of the present civil service setup of job classification, and make available to the civil service commission complete information pertaining to each position in the department. The commission can then allocate that position to a classification equitable and just to the employee to be appointed to it.

4. It is proposed to set up a perpetual inventory of all positions in the department, with provisions for an adequate personnel organization to administer and maintain it efficiently.

The first two steps in the survey plan are well under way at this writing. I am not informed relative to the actual progress made thus far in covering the general field for wage statistics, but I am told that more than two-thirds of the positions in the department have already been surveyed and described by the assigned analysts.

Because I am personally interested along the lines of vocational adjustments in the entire field of business which will eventually reconcile individual talent trends with job requirements, I tried to get a commitment from my informer as to whether or not the plan now under way would ultimately be carried that far; that is, developed into what might be termed a "Bureau of Human Engineering," whose chief purpose would be to see that the "round-and-square-hole jobs" in the department are actually filled by corresponding "round - and - square pegs." While it was intimated that such an objective might be in the offing as a possible goal to be achieved, no positive assurance of an early probability was forthcoming.

While there are obscure instances in which a plan for personnel administration similar to the one instituted by the Los Angeles Department of Water and Power has been inaugurated and successfully executed, this civic enterprise is certainly a pioneer in the civil service field. The degree to which it may be accepted generally as a civil service procedure will largely depend upon the success attending this experiment. Observers in all phases of business administration will watch it with keen interest and, it is hoped, with growing conviction that it can and will afford a better way of living in our beloved America, eliminating for all time the destructive losses due to employee-management disagreements.

Government Utility Happenings

PROPONENTS of river basin development, with one notable exception, generally were pleased with President Truman's combined report on the state of the Union and the annual budget. In his lengthy message to Congress late last month, the President advocated a program of multiple-purpose river projects which, he declared, would "open the frontiers of agriculture, industry, and commerce," and offer employment opportunities "to ease the transition from war to peace."

His failure to suggest that certain projects be carried out by proposed "valley authorities" was deemed disappointing in some quarters. Particularly displeased was the group which has been seeking the establishment of a Columbia Valley Authority to continue the development of the Pacific Northwest area, centering around the Bonneville and Grand Coulee projects. This group has been hoping for an endorsement of CVA plans from the White House for several weeks.

Mr. Truman approved a number of specific projects, including some on which construction already is in progress and others which have been rejected by Congress while yet in the planning stages. In the latter category was his renewed advocacy of the St. Lawrence seaway project, which he included in a list of previous recommendations on which the Congress has not acted. He then urged the continuation of work in several river basins. He said:

> Through the use of the waters of the Columbia river, for example, we are creating a rich agricultural area as large as the state of Delaware. At the same time, we are producing power at Grand Coulee and at Bonneville, which played a mighty part in winning the war and which will found a great peacetime industry in the Northwest.
>
> The Tennessee Valley Authority will resume its peacetime program of promoting full use of the resources of the valley. We shall continue our plans for the development of the Missouri valley, the Arkansas valley, and the Central valley in California.

THE President then touched upon the construction of transmission lines from these projects, a subject which has caused much heated debate in Congress. Time and again the Congress has refused the Interior Department, as the operating agent for government hydroelectric projects, permission to construct extensive and competitive transmission systems in connection with these projects. Mr. Truman indicated that he is in accord with the policy of the Interior Department in respect to this controversial issue, making the following statement:

> The public power program . . . must continue to be made effective by building the necessary generating and transmission facilities to furnish the maximum of firm power needed at the wholesale markets, which are often distant from the dam sites.

The President followed up this policy statement with recommendations in his budget message for funds for transmission line construction during the next year on a broad scale by the Southwestern Power Administration and the Bonneville Power Administration. The budgetary allocation for the Bonneville project calls for the construction of 600 miles of transmission lines and 14 substations. Practically all of the funds requested for the Southwestern Power Administration are scheduled to be spent on extensions of that agency's transmission system.

These proposals already have produced verbal fireworks in House hearings on Interior Department budgetary appropriations. Their progress in further congressional debate will be watched with interest.

* * * *

THE Southwestern Power Administration has completed plans for a long-range program of power distribution from multiple-purpose reservoir projects operated by the agency. These plans are outlined in a recently issued report, entitled "Report on Comprehensive Plan of Power Distribution and Sales from Hydroelectric Projects in the Southwestern Region."

The report indicates that the agency hopes to initiate this year a program calling for construction, over a period of twenty years, of a network of transmission lines interconnecting the dams and carrying their power output directly to wholesale consumers. Funds to start the first phase of this program have been requested in the annual Department of Interior budget, now being considered by Congress.

Analyses of the power market and the facilities required to serve it are contained in the SWPA report, together with proposed rate schedules for sale of power from the system. According to SWPA Administrator Douglas G. Wright, it is planned to market power from the proposed system at the consumer's premises for an average rate of 5 mills per kilowatt hour initially, "with a strong probability that rates can be substantially reduced within five years." Mr. Wright continued:

> Two rate schedules have been submitted to the Federal Power Commission for approval. Rate schedule "A" is for sales to customers such as rural coöperatives, municipalities, and private companies, who resell the electricity to ultimate consumers. It consists of a charge of 60 cents per month for each kilowatt of contract demand, and 3½ mills per kilowatt hour for all energy used. The "B" rate schedule is intended to be used by consumers which use the energy themselves, such as industrial concerns. It consists of a flat charge of $2 per month for each kilowatt of contract demand, with no additional charge for the energy. This will result in a rate of approximately 5 mills per kilowatt hour to the average industrial establishment, with very low rates, ranging down to 3 mills per kilowatt hour, for industries which operate three shifts per day or otherwise attain high load factors.

The program, Mr. Wright explained, is designed to provide marketing facilities for power production at: (1) the dams already constructed, or authorized for construction, which will be operated by the agency; (2) dams which will be built in the area if additional projects now under study by the Army's Corps of Engineers are approved by Congress. The initial phase of the program covers power production from multiple-purpose projects which have been completed or authorized. Mr. Wright indicated the extent of this portion of the plan as follows:

> These dams have an aggregate total capacity of 666,600 kilowatts. To distribute and market the power adequately will require the construction of approximately 8,400 miles of transmission lines and the construction of approximately 210,000 kilowatts of supplemental steam-generating capacity over a period of five years, within which the entire electric output of the dams could be absorbed.

IF the additional projects being studied by the Corps of Engineers are authorized, Mr. Wright estimates, the ultimate installed hydroelectric capacity in the system will amount to 1,397,600 kilowatts. This will necessitate, he added, the construction of a total of approximately 15,000 miles of transmission lines and 770,000 kilowatts of supplemental steam-generating capacity over a period of twenty years.

Existing facilities will be used whereever possible in the program, he declared. Present plans call for the purchase of some existing facilities and agreements with other utilities, both public and private, for the mutual use of others. "However," Mr. Wright said, "the greater part of the major network interconnecting the projects and load centers must be constructed, because adequate facilities to take their place are not in existence."

During the next fiscal year (1947), SWPA hopes to get this program under way with whatever funds are granted the agency by Congress for the purpose. Initial allotments, the agency reported, will be used as follows:

> . . . to purchase the Ark-La transmission line and substations, extending from Markham Ferry, Oklahoma, to Lake Catherine, Arkansas; to purchase and complete the government-owned steam plant at Lake Catherine; to construct a transmission system extending from Norfork dam in Arkansas to Springfield, Missouri, and to a connection with the Ark-La line, from Markham Ferry to Tulsa, thence to Denison dam and into north Texas. It will integrate the Norfork and Denison projects with each other and with the steam plants, and will provide for service to Springfield and to a number of other municipalities, to REA coöperatives in Missouri, Arkansas, Oklahoma, and Texas, and to Arkansas Power & Light Company, Public Service Company of Oklahoma, Oklahoma Gas & Electric Company, and the Texas Power & Light Company. It is planned to make available to the private companies considerable amounts of peaking power, which will reduce their own operating costs.

Plans for the proposed transmission network were undertaken at the direction of Secretary of Interior Ickes, Mr. Wright asserted. Authority for the program was provided by § 5 of the Flood Control Act of 1944, he added. Apparently, this view is based on the portion of § 5 which specifies: "The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available at wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal government, public bodies, coöperatives, and privately owned companies."

* * * *

CLARIFICATION of certain provisions of the 1939 Reclamation Act and other legislation having to do with the amortization of multiple-purpose reclamation projects is being studied by the House Irrigation and Reclamation Committee. Representatives of the Bureau of Reclamation and of the National Reclamation Association already have testified before the committee, which is holding hearings on the Robinson Bill (HR 5124).

The hearings are a result of a debate on the floor of the House last December when several members of the Appropriations Committee strenuously objected to the Interior Department's interpretation of existing reclamation laws in regard to the repayment of Federal funds advanced for multiple-purpose projects. Specifically, they objected to a ruling by an Interior Department solicitor which, in effect, held that the 1939 Act did not require repayment of the original investment in commercial power features of such projects, but only 3 per cent interest annually thereon. Prior to this ruling, the Bureau of Reclamation had interpreted the law to require the payment of both principal and interest on the commercial power investment.

The bill proposed by Congressman Robinson, Democrat of Utah, as originally drafted, amends the 1939 Act to definitely provide for the payment from power revenues on hydroelectric power projects of: (1) an appropriate share of the annual operation and maintenance costs; (2) an appropriate share of the construction investment, with annual interest.

ANOTHER feature of reclamation amortization policy which was opposed by members of the Appropriations Committee has been discussed during the hearing and may be covered by an amendment to the Robinson Bill. This was a provision of the Hayden-O'Mahoney amendment to the Reclamation Act, a measure passed in 1938. A section of this legislation provided that the repayments from irrigation projects should be covered into the reclamation fund.

According to spokesmen of the Reclamation Association, this procedure is outdated. Their testimony on this subject, which follows, is almost identical

with the objections of members of the Appropriations Committee:

> In 1938 such a procedure appeared to be justified. However, now that a greater proportion of reclamation appropriations are coming from the general fund of the Treasury rather than from the reclamation fund, we should recognize the validity of the objection of turning into the reclamation fund repayments that are made from projects hereafter built wholly by appropriations from the general fund of the Treasury.

* * * *

OPERATORS of rural electric systems financed by the Rural Electrification Administration purchased 2,233,-909,904 kilowatt hours of electric energy for distribution to 1,287,000 consumers during the fiscal year of 1945, according to a recent announcement by REA.

Total energy purchased by REA systems during the period exceeded by 245,-643,196 kilowatt hours the previous high of 1,988,266,708 kilowatt hours purchased during the 1944 fiscal year. At the same time, the report adds, the total wholesale power bill of the 832 REA-financed systems energized on June 30, 1945, amounted to $18,273,207, also a new high. The average cost of 8.2 mills per kilowatt hour represented a reduction of two-tenths of a mill from the average wholesale rate for 1944. Privately owned producers supplied 995,-947,531 kilowatt hours, or 44.6 per cent, of the total energy purchased during 1945, the announcement concludes.

Incidentally, REA last month completed the transfer of its employees from St. Louis to Washington, where it is now located in the Agriculture Department buildings. Personnel of the agency began moving during the first week in November. Of the 719 employees at the St. Louis headquarters and 221 field representatives, 157 resigned or transferred to other positions in St. Louis.

* * * *

LENGTHY litigation involving the acquisition of property of the Portland General Electric Company by a state of Washington public utility district was concluded recently with a court decision approving the district's financial arrangements for the transfer.

In a taxpayers' suit against Public Utility District No. 1 of Clark county, Superior Court Judge J. E. Stone ruled that the district had the authority to sell electric revenue bonds at a discount to a Des Moines, Iowa, firm. The district had proposed the bond sale to finance its acquisition of Vancouver, Washington, properties of Portland General Electric Company. The taxpayers sought to enjoin the delivery of the bonds, but Judge Stone sustained the district's general demurrer and dismissed the action.

The district obtained a condemnation judgment from a Federal court jury in Tacoma in October, 1945. Compensation to the company was fixed at $801,-000. The company gave notice of an appeal to the circuit court of appeals, but on January 10, 1946, United States District Judge Charles H. Leavy entered a decree of appropriation, passing title to the condemned properties to the district. The district took possession of the properties on the following day.

* * * *

SENATOR Elmer Thomas, Democrat of Oklahoma, chairman of the Senate Agriculture and Forestry Committee, recently told Washington newsmen that the Murray Bill (S 555) for a Missouri Valley Authority is "dead for this session of Congress."

This statement followed a surprise appearance by Senator James E. Murray, Democrat of Montana, before the committee to present a request that hearings on his bill be postponed. Senator Murray announced that he was not prepared to proceed with testimony on behalf of an MVA due to the pressure of other legislative duties. Hearings on the bill were scheduled to close on March 15th, but Senator Thomas obtained the consent of the Senate to extend the deadline until the end of the year.

Last year the Senate Commerce Committee and Irrigation and Reclamation Committee made unfavorable reports on the Murray Bill.

Wire and Wireless Communication

THE New York Telephone Company on January 15th announced that it would spend $80,000,000 this year and $350,000,000 before the end of 1950 on a plant construction program.

Carl Whitmore, president, said full development of the plan depended upon several essentials, including man power and equipment. Fundamental to the whole program, he commented, was the availability of new capital, held to hinge upon sufficient earnings to continue to attract investment by the public in the business of the Bell system.

"Our foremost job," Mr. Whitmore continued, "is to catch up on the huge accumulation of some 314,000 orders for new service on the waiting list since December 31st."

The company estimated that the number of telephones served would increase from the January 1st total of 3,225,000 to 3,600,000 by the end of 1950. During 1945 the company "connected" 133,000 additional instruments.

The cost of new station equipment and replacement of old equipment was estimated at $172,000,000 for the five years through 1950, with central office equipment for the same period to cost about $95,000,000, including extension of dial service by replacing 150 manual offices serving 600,000 telephones. These replacements will include all remaining manual offices in New York city, most of those in Westchester county, and the larger manual centers on Long Island and upstate New York.

Construction costs for new cable, wire, and poles were set at $55,000,000, including $40,000,000 for growth and improvement of existing centers. The plans for new buildings and additions, alterations, and improvements, call for $12,000,000, and so-called miscellaneous features are estimated at $8,000,000 more.

AMONG special projects on the company's program are expansion of dial service areas that would permit dial telephoning between New York city and suburban points in the state, introduction of operator toll dialing in the larger cities of the state, by which method operators may dial calls straight through to the called telephone, "even across the continent," and development of mobile radiotelephone service in New York city and its environs to bring 2-way voice communication to motor vehicles. Application for radiotelephone service was pending before the Federal Communications Commission, it was reported.

The company also is building two new systems for increasing long-distance channels for voice messages and for sound and television programs. One is a radio relay system between New York and Boston for the experimental use of microwave transmission and the other is a coaxial cable network from New York to outlying cities.

Expansion of rural telephone service in New York state is progressing, Mr. Whitmore said. He pointed out that there were about 125,000 rural tele-

phones, of which 75,000 were served by the company. This represents an increase of 34,000 since 1940. In a large number of telephone exchanges the company already has replaced many of the 25,000 hand-crank telephones with modern instruments.

* * * *

DURING the last three months of 1945 the number of telephones in service in the United States increased 559,000, representing the largest rise in any quarter of the Bell system's history, Walter S. Gifford, president of the American Telephone and Telegraph Company, announced on January 15th. Unfiled orders numbered 2,000,000 at the end of the last quarter, Mr. Gifford said, adding that 22,440,000 phones were in service at that time and that new ones were being installed at the rate of 2,200,000 a year.

At the end of 1945 the average daily number of telephone calls was more than 11 per cent greater than at the close of the preceding year.

Reviewing the agreement with the Federal Communications Commission to reduce interstate rates by February 1st at a saving of $20,000,000 annually to the public, Mr. Gifford declared that "there is nothing in the present or near future outlook" of the system's earnings "that would justify any rate decreases."

With December figures partly estimated, he said, the net income of the company for 1945 was $171,831,000, equal to $8.67 a share, compared with $163,165,614, or $8.54 a share, in 1944. Dividends in 1945 were $178,388,000, against $171,897,507 in 1944.

* * * *

BY dialing "1-2-3-4" on a standard Western Electric telephone handset attached to the dashboard of an automobile moving through Central park on January 24th, the driver of the vehicle was able to keep in constant telephonic communication with a transmitter in the Dumont Laboratories on Madison avenue in New York city.

Frederick T. Budelman, chief engineer of the Link Radio Corporation, explained that this "selective calling" of individual cars, within a 50-mile radius, had been made possible through the use of a 152—162-megacycle high-frequency band.

It also will make possible in the near future, he added, dialing into existing telephone lines for local and long-distance calls. It will enable the central station to make contact with any car on the road, if its general location is known, he said.

This test was made in conjunction with the convention of the American Institute of Electrical Engineers at its fourth session in the Engineering Societies building, New York city.

Further details furnished by Mr. Budelman concerning the new equipment used for 2-way radio communication revealed that the transmitter which sends out the high-frequency waves is equivalent to a 750-watt unit. The station antenna through which it operates is 750 feet above the street.

"With the installation of a 15-watt transmitter in the mobile unit," he continued, "it is possible to dial either the main station or another car, with the same equipment. This system can be expanded to include any number of cars or groups of cars."

Among possible users of this improved system, he listed not only police departments, fire departments, and public utilities, but also taxicabs, busses, remote pickups for broadcasters, and private telephone service.

* * * *

THE National Federation of Telephone Workers' executive board on January 13th announced a strike of 250,000 telephone workers would be delayed thirty days and that it had requested withdrawal of pickets from telephone exchanges.

The action followed immediately on a decision to order a strike and was taken "on advice of counsel," the board announced.

A federation spokesman said it would adhere "strictly to provisions of the

Smith-Connally Act, and has directed its member unions to file 30-day strike notices."

Further, the spokesman said, the federation has requested striking Western Electric Company workers to withdraw the picket lines around telephone exchanges—the primary cause for the present telephone stoppage.

The federation requested the Association of Communications Equipment Workers, federation affiliate which struck on January 9th at the Western Electric Company, to "defer the strike, withdraw their pickets, and turn the issues in dispute over to the NFTW."

Asked if this meant the Western Electric strike would be called off, the spokesman replied: "I think they'll go back to work in the morning."

Joseph A. Beirne, president of the National Federation of Telephone Workers, earlier had announced that the federation's executive board had ordered a nation-wide strike. Mr. Beirne, after a four-and-one-half-hour executive board conference, said the federation's 48 member locals would determine "just when and how and in what manner" the strike call would be carried out.

A Labor Department spokesman said legal papers necessary for government seizure of telephone systems already were drafted. Officials have made it clear that the government would be unwilling to permit a "total collapse" of communications such as was mentioned by a union spokesman in discussing strike prospects on January 12th.

The Labor Department official, who asked that his name not be used, said the question of government seizure might hinge not on the actual calling of a general company strike, but on how successful such a walkout proves if it is called.

* * * *

DECLARING that its financial future is endangered, the Michigan Bell Telephone Company filed suit in the Ingham Circuit Court on January 11th to invalidate state orders for a refund of $7,000,000 to customers in revenue for 1944 and 1945, and for a rate reduction of $3,500,000 this year. The bill of complaint asked that the proposed refunds to 1,000,000 patrons and the rate cuts affecting 640,000 customers be enjoined pending a final determination.

Deploring the fact that the company must be the only major utility to challenge a rate order by the Michigan Public Service Commission, Thomas N. Lacy, president, said that "we feel obliged to oppose any action that we believe will jeopardize the quality of future service by the company."

Although the refunds are intended to avoid Federal excess profits taxes, Lacy said one-seventh of the total would come from revenue, and declared that "irreparable loss and injury" would result, The commission's ruling was challenged as "arbitrary, unjust, and unreasonable," and in violation of Federal internal revenue regulations and the state Constitution.

Lacy said that the company was unable to increase its facilities during the war to meet ordinary civilian needs, and that a $50,000,000 expansion program is essential now merely to supply normal service.

"Expansion by that amount, with no additional revenue, would drive our rate of earnings even lower than the inadequate level to which they have fallen," he said.

Lacy declared that the commission underestimated the effect of the rate cut it ordered.

* * * *

THE third week of the strike of members of the American Communications Association, Congress of Industrial Organizations, began on January 24th with continued picketing in front of the Western Union building, 60 Hudson street, New York city, and the announcement by union officials that letters had been sent to President Truman and to Senators Robert F. Wagner and James M. Mead, protesting against "the laxity" of the Federal Communications Commission in dealing with conditions arising out of the strike.

A copy of the protest was sent also to

Paul A. Porter, chairman of the FCC. The Joint CIO Strike Support Committee charged that the FCC "by its inaction had been giving aid and comfort to the company."

T. B. Gittings, vice president in charge of public relations for the Western Union, announced that the telegraph offices in New York city handled more than 25 per cent of normal business on January 24th. This, he said, was the highest point reached since the strike started.

Mr. Gittings said that this was possible because some of the strikers were returning to work.

Company officials refused comment on the protest to President Truman, which said:

> It has always been our impression that the commission was established to regulate the communications industry for the protection of all the people. This certainly carries with it the obligation to punish violations of the law to guarantee against their reoccurrence. Yet we find the FCC guilty of a complacency which is in fact giving active aid and comfort to a company which has shown such great irresponsibility toward the telegraph-using public, toward its employees, and toward the law.

The CIO officials said the FCC had a public responsibility to do everything in its power to have normal telegraph service restored and criticized it for having failed to do this. The letter noted that the union accepted the proposal of Mayor O'Dwyer for arbitration of the dispute, and termed the refusal of the company to go along as "unjust, unreasonable, arbitrary, and arrogant."

MEANWHILE, the possibility of intervention in the Western Union telegraph strike by the FCC was scheduled to be studied when the commission met the latter part of last month, Paul A. Porter, chairman, announced.

Porter said the FCC was deeply concerned about the tie-up of facilities in the New York area but expressed doubt as to whether the commission has the authority to act to restore service. He pointed out that the FCC has no power or jurisdiction with regard to a labor dispute. "We are concerned with maintenance of service," he declared.

The American Communications Association called its workers out in the New York-northern New Jersey area early last month in protest against a War Labor Board pay rise decision. The union protested to the FCC on January 19th over the Western Union practice of using special delivery mail in delivering telegrams in New York city. The practice violates the Federal Communications Act, it was charged.

Joseph P. Selly, president of the ACA, and company officials continued to dispute the effect of the strike on telegraphic communications in New York. Selly contended that service was 95 per cent curtailed. Company spokesmen asserted traffic was at 25 per cent of normal.

Selly also maintained the tie-up had reduced traffic nation wide by 25 per cent, while the company reported it had but little effect outside of the city of New York.

* * * *

THE independent telephone companies recently won a preliminary victory in the Wage-Hour Bill. The Senate Labor Committee, in breaking the long deadlock on the bill to increase the national minimum wage from 40 cents to 65 cents, has taken cognizance of the telephone companies' plea for relief of smaller telephone exchange operations. The prevailing law exempts telephone operators in exchanges of less than 500 stations. The Senate committee bill increases this exemption to operators at exchanges of 1,000 stations. The exemption would also extend to Bell system operation. Otherwise, the law provides for an increase of the minimum wage for all industry from 40 cents to 65 cents an hour within one hundred and twenty days after enactment, and up to 70 cents within two years, and up to 75 cents within five years. It is generally expected that the House bill will not carry through the drastic minimum wage provisions of the Senate version.

Financial News and Comment

By OWEN ELY

Saratoga Decision Failed to Clarify Question of Taxing Public Power Agencies

On January 14th the U. S. Supreme Court handed down a 6-to-2 decision that New York state and its two agencies, Saratoga Springs Commission and the authority, must pay the Federal tax of 2 cents a gallon on bottled mineral and table waters sold commercially. The case had been before the court for some time, and it had indicated that it was interested in reviewing the whole broad question of state tax immunity. Hence briefs had been filed in support of New York state's claim for tax exemption by the attorney generals of 47 states and the solicitors of 12 cities. However, despite this widespread interest in the case the decision unfortunately failed to clarify the question whether public power agencies can legally be taxed by the Federal government. Apparently little more progress had been made in clearing up this important issue than in previous decisions, such as the one involving the street railways in Boston (after they were taken over by the state of Masschusetts), the South Carolina liquor case, etc.

The eight members of the court who considered the Saratoga Case were split into four groups. Justices Douglas and Black would deny the Federal government any power whatever to tax the states or their agencies, regardless of the nature of the activities involved. On the other hand, Justice Frankfurter, in his opinion, held that Congress has the same broad power to impose taxes as it has to regulate the commerce between states. Four members, Chief Justice Stone and Justices Murphy, Reed, and Burton, took a middle-of-the-road view. They would differentiate between the various state or municipal activities, such as the operation of street railways, the sale of liquor, mineral water, etc. The special opinion of Justice Rutledge raised a minor point of statutory construction.

Press comments on the case have varied widely. *The Journal of Commerce* (New York) stressed the court's contention that the early statement by Chief Justice Marshall, "the power to tax involves the power to destroy," had mistakenly become the "basis of a broad doctrine of intergovernmental immunity, while at the same time an expansive scope was given to what were deemed to be 'instrumentalities of government' for purposes of tax immunity." This paper went so far as to hold that the Internal Revenue Department might now feel free to levy taxes on some of the power agencies (other than those created by Congress), which would place this particular question, of such broad interest to the utility interests, before the courts for specific interpretation. The *Journal* felt that public power agencies had received a setback. The *Bond Buyer*, Wall Street organ of the municipal bond business, took a somewhat opposite point of view, and more recently Paul Heffernan in *The New York Times* held that the decision was a definite aid to the future market for tax-exempt bonds of state and local governments.

Mr. Heffernan held that, despite the fact that the court permitted Federal taxation of mineral water for commercial sale, "in fundamental effect the concensus of the court majority was a reaffirmation of the historic doctrine of reciprocal

Federal-state immunity from tax or other derogative interference." Such immunity had never been seriously questioned until the attempt made during the war to tax the bonds of the Port of New York Authority, which the Supreme Court refused to sanction.

Austin J. Tobin, secretary of the Conference on State Defense, held that the states, in filing their brief, expressly refrained from supporting the immunity of the specific bottling operation, and restricted themselves to a discussion of the basic doctrine of immunity, which viewpoint was upheld by a majority.

It is unfortunate that the issue of public power taxation has not yet been presented to the Supreme Court in specific form. Unless this can be done through action of the Treasury Department, it may be necessary for Congress itself to enact new legislation, which would eventually go to the Supreme Court for determination. Such action might well be undertaken by the Boren Committee in the House, which has been exploring this field.

Geographic Integration Requirements

In former years there has been much discussion over the meaning of § 11(b)(1)(B) of the Holding Company Act "that the commission shall permit a registered holding company to continue to control one or more additional integrated public utility systems, if, after notice and opportunity for hearing, it finds that . . . all of such additional systems are located in one state, or in adjoining states, or in a contiguous foreign country."

The commission wrestled with the interpretation of this proviso for many years, and more recently the Supreme Court indicated some interest in the question. At one time it was assumed that the phrase "in one state, or in adjoining states" must be rigidly interpreted—that the system could not extend beyond one selected state and a ring of states immediately adjoining it. But the recent permission granted American Gas & Electric by the SEC to retain its entire central interconnected system, divesting itself only of two separate outlying properties (Atlantic City and Scranton), definitely widened interpretation of the phrase. Even if Ohio be taken as a "central state" in the American system, only Michigan, Indiana, West Virginia, and Kentucky would qualify as adjoining states, whereas the system extends further into Virginia and Tennessee. It is true, of course, that the sections served in these states do not make up a very big part of the system, and they are fully interconnected with the other properties (excepting the two which will be disposed of).

A similar case is the southern group of Commonwealth & Southern. At one time there seemed to be some doubt whether the SEC would permit the southern group to be retained intact, despite the fact that it is interconnected. Under the narrow interpretation of "adjoining," Alabama as a selected state is bordered by Mississippi, Florida, and Georgia, but South Carolina would have to be dropped. While the Commonwealth Case is not yet closed it appears likely that the broader interpretation of the geographic phrase will govern, and this may help expedite the final reshuffling of other holding company systems to conform to the law.

Commonwealth & Southern

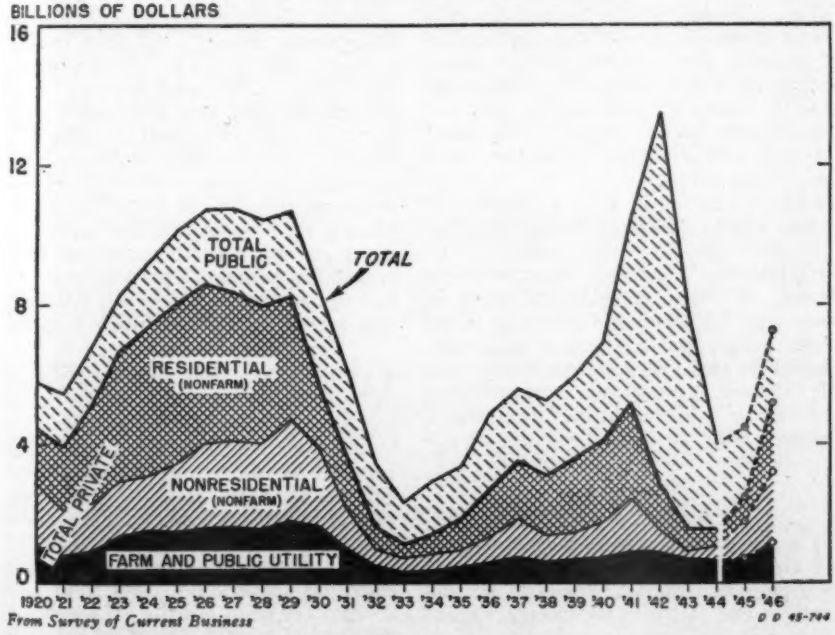
The SEC, having permitted Commonwealth & Southern Corporation to amend its integration plan, has indicated that it finds the new plan "highly complicated and confusing." Hence the commission has requested the company, or any other party interested in the reorganization, to file a new plan within thirty days, following which hearings or other action will be taken. The SEC, while willing to permit retirement of the preferred stock in order that common stockholders can obtain a more substantial equity than would have resulted from the original plan, apparently leans toward

the method of selling or distributing part of the assets to accomplish this purpose, rather than giving common stockholders an option to put up necessary funds.

Arthur J. Neumark, a partner of H. Hentz & Company, recently prepared an interesting analysis on Commonwealth. He pointed out that net income reported for the twelve months' period ended November 30th, amounting to about $14,500,000, would have been nearly doubled if allowance were made for tax savings under the new law and for uncompleted refinancing of the operating subsidiaries' bonds and preferred stocks. The system would recover over $1,200,000 in 1946, representing the previous annual plant amortization of Consumers Power, now completed; and in 1947 Georgia Power's transportation write-off program also would be out of the way, saving an additional $930,000 (income taxes adjusted).

The general outlook for the system was considered highly favorable, since total revenues have been running less than 1 per cent below a year ago despite the loss of heavy war business, strikes, etc. Gas revenues are up about 9 per cent and substantial gains in electric output are anticipated. While some rate cuts may be in order, the system's average residential rate, approximately 2.7 cents per kilowatt hour, is already well below the average for the country, and, in the past, decreases have produced an expanding volume of business. Earnings for 1946 are forecast at around $30,000,000 or about 63 cents a share on the common stock after deducting preferred dividend requirements; and capitalizing these earnings at 15 times would indicate a value of $9-$10 a share.

New Construction Activity by Types [1]



[1] Data for 1945 and 1946 are preliminary estimates.
Sources: U. S. Departments of Commerce and Labor, and War Production Board.

APPROACHING the matter from another angle, capitalizing the estimated 1946 operating company earnings at 15 times would give a valuation of about $450,000,000, to which could be added $14,000,000 net working capital of the parent company. Deducting the full claim of the preferred stockholders ($139.25 a share for redemption price and arrears, or a total of $206,300,000) would leave a net valuation of $258,000,000, or $7.70 a share for the common.

Still another approach would be to assume that Consumers Power, Central Illinois Light, and Southern Indiana Gas & Electric could be sold at about 18 times earnings, which together with parent company cash would suffice to retire the preferred stock. Common stockholders would then retain Ohio Edison plus the southern properties, with combined 1946 earnings estimated at 60 cents a share on the parent company's common stock. Capitalizing the latter figure at 15 times would give a value of $9. Other possible plans, according to Mr. Neumark, would be to dispose of Ohio Edison instead of Consumers Power, raising the balance of required funds by a moderate bank loan. Or the shares of three out of the four northern properties might be distributed to preferred stockholders, together with a cash payment.

It appears likely that a number of plans will be submitted to the SEC. But the $64 question in attempting a valuation of the company's assets is—how much will state commissions exact in rate cuts. Indiana is trying to take *all* the tax savings for consumers. Michigan, based on past action, might follow suit. It is hoped, however, that a more liberal attitude will prevail in the country as a whole.

Pro Forma Figures

IN the previous issue, the department commented on the need for *pro forma* earnings figures, with complete tax detail, in each security prospectus, so that investors could promptly obtain the essential information needed to appraise the new offering. In this connection attention was called to the earnings setup in the recent Potomac Edison prospectus, which might be taken to indicate over-all coverage of interest and preferred dividend requirements at only about 1.32, whereas the *pro forma* statement would show about 2.10, and almost 4 might be estimated after allowance for 1946 tax savings, etc.

Another interesting example is the prospectus on Dallas Railway & Terminal common stock dated January 23rd. On page 5 of the prospectus a summary of earnings and dividends indicates there were no share earnings at all in the prewar years 1939-41, and no dividends. This was misleading, since fixed charges in the prewar period averaged about $307,000 compared with only $119,000 in the twelve months ended October 31, 1945. Of course Federal taxes would have absorbed (on the present basis) 38 per cent of this saving. Another misleading item was the prewar rental for leased property approximating $186,000, which disappeared during 1942 due to corporate changes. (The leased property was given to Dallas by Electric Power & Light in 1942, as a result of a series of transactions described on page 8 of the prospectus.) Thus, the prewar earnings on a *pro forma* basis might be estimated at around $1.40 after allowing for taxes at the present rate. While this does not necessarily mean that postwar earnings will approximate prewar, nevertheless the *pro forma* figure is a necessary step toward appraising future earnings.

WHILE the various groups which bid for the issue had doubtless studied the earnings record carefully, it is interesting to note that the company assumed a possible price of $30 (in calculating its registration fee). The successful bid was $21.649, and the second bid was quite close at $21.379. (The top bidders evidently assumed that the stock could be successfully offered to yield about 6 per cent, based on the indicated dividend of $1.40.) The third bid, however, was only 15.59, and it was also

PUBLIC UTILITY SECURITY OFFERINGS IN SECOND HALF OF 1945

Rating Moody		Amount (Mill.)	Offering Price	Recent Price	Call Price*	Approx. Yield
	Bond Issues					
Baa	Mountain Sts. Pr. 1st 3/75	$ 8	101.95	104¼	105¼	2.79%
Baa	Portland G.E. 1st 3¼/75	34	102.41	106¼	105.95	2.81
Aa	Penn. Tel. 1st 2¾/75	6	102.50	103½	105¼	2.70
Aa	Amer. T. & T. deb. 2¾/80	175	100	105¼	107	2.53
Aa	So. Bell T. & T. deb. 2¾/85	45	101.125	105⅜	107	2.51
Baa	Kings Co. Ltg. 1st 3¼/75	4	102.41	103½	105⅜	2.95
A	Monongahela Pr. 1st 3/75	22	102.50	108	106¼	2.59
A	West. Lt. & Tel. 1st 3/75	6	101.95	104	106¼	2.80
Aa	Consumers Pr. 1st 2¾/75	114	102.37	106⅓	106⅜	2.53
Baa	Ind. Gas & Wtr. 1st 3¼/70	6	102.187	103½	105¼	2.92
A	Minnesota P. & L. 1st 3¼/75	26	102.46	107⅔	105.46	2.74
A	Pub. Serv. Ind. 1st 3¼/75	48	102.46	109½	105.50	2.64
Aa	Amer. T. & T. deb. 2¾/75	160	100.25	106	106	2.45
Aaa	Conn. L. & P. ref. 3/80	15	106.75	110⅔	109.75	2.53
A	Penn. P. & L. 1st 3/75	93	101.375	106½	104.375	2.64
Aaa	So. West. Bell Tel. deb. 2¾/85	75	101.83	105⅔	106	2.51
A	Calif. Wtr. Serv. 1st 3¼/75	11	108	110⅔	111	2.72
Aaa	Cincin. G. & E. 1st 2¾/75	46	101	106	105¼	2.43
Aa	Pacific G. & E. ref. 3/77	49	105.30	108½	108½	2.56
Baa	Penn. Pr. & Lt. deb. 3/65	27	101.50	106½	106⅔	2.64
Aa	Pub. Serv. Okla. 1st 2¾/75	23	99.50	101½	103	2.69
Aa	Dayton Pr. & Lt. 2¾/75	29	101.625	105½	106	2.45
A	Montana Pr. 1st 2¾/75	40	101	104⅔	104	2.65
Aa	No. States Pr. (Minn.) 1st 2¾/75	75	101	104⅔	104½	2.49
A	Penn. Pr. 1st 2¾/75	10	102.50	102½	106⅔	2.75
Aa	Union Elec. of Mo. 1st 2¾/75	13	101.02	105	104.05	2.47
A	Lake Sup. Dist. Pr. 1st 3/75	6	102.50	105½	105	2.74
Ba	United Transit deb. 4/60	6	100	100⅞	104	3.92
Aa	Pac. T. & T. deb. 2¾/85	75	102.45	105⅔	106	2.50
Baa	Phila. Trans. 1st & ref. 3¼/70	7	101	103½	105	3.55
Aa	Buff. Niag. Elec. 1st 2¾/75	57	102.06	104½	105.06	2.54
A	Sioux City G. & E. 1st 2¾/75	8	100.625	103	103.63	2.61
	Preferred Stocks					
	Panhandle E. P. L. 4% pfd.	$14	104	111	108	3.61%
	Penn. Tel. $2.10 pfd.	4	55	59	...	3.56
	Idaho Power 4% pfd.	4	105.50	109	106	3.68
	Monongahela Pr. 4.40% pfd.	9	103.50	112	108½	3.93
	Union Elec. of Mo. $3.70 pfd.	4	101.75	106	104⅔	3.50
	Pub. Serv. Okla. 4% pfd.	3	102.75	110	107⅔	3.65
	Unit. Transit 5% conv. pfd.	4	50	54	53½	4.63
	Ind. Assoc. Tel. $2 pfd.	2	50	52	52½	3.86
	Sioux City G. & E. 3.90% pfd.	4	102	105½	107	3.72
	Cent. P. & L. 4% pfd.	10	102.75	106½	107⅔	3.76

*May be callable at lower price for sinking fund.

Date of Offering		Number of Shares	Offering Price	Recent Price
	Common Stocks			
8-23	Rockland Gas	30,500	26	28
9-12	Central Hudson G. & E.	445,778	9.70	13¾
9-18	Pacific G. & E.	700,000	40	45
10-24	Florida Power Corp.	539,240	17	18
10-26	Montana-Dakota Util.	223,351	11.50	13
11-8	Central Arizona L. & P.	840,000	13½	13
11-2	Central La. Electric	4,065	26	29
12-12	Sioux City G. & E.	153,006*	28½	32

*Subject to exercise of subscription rights on about two-thirds of the amount.

rumored that a "freak" bid of only about 3 appeared. In any event, it is obvious that the question of market valuation was a difficult one at best, and the lack of *pro forma* figures doubtless added to the obstacles.

Another difficulty in interpreting the earnings table for 1939-45 (page 4 of the prospectus) was the wide variation in the property retirement reserve from year to year, plus the fact that in 1944-45 transfers of net income to surplus reserve accounted for part of the reduction. Some effort might have been made to iron out these discrepancies in a *pro forma* statement, though this is a more debatable point.

Transit Stocks

A YEAR ago it was apparently assumed that the prosperity of the transit companies was purely a wartime phenomenon which would quickly fade after V-Day. It was not generally realized that many cities would continue crowded with returning GI boys despite loss of war contracts, and that it might be several years before the supply of automobiles would go back to normal. In general, it appears that the transit companies are still doing very well; in some cases traffic has even been higher than in the year previous.

It is very difficult, however, to obtain satisfactory current earnings figures. In most cases interim reports are for the nine or ten months ended September or October, rather than the twelve months' basis so commonly used by the electric light and power companies. This means a necessary adjustment which may prove inaccurate. In some cases no interim figures at all are available, and in other cases there are contingency charges or tax irregularities. The figures contained in the table below should therefore be carefully checked by any reader interested in a particular issue. They are presented only to afford a broad picture of the relationship between prices and earnings. Newcomer to the list is Dallas Railway & Terminal, whose common stock was sold to the public at $23.25 a share on January 23rd by a syndicate headed by First Boston and Blyth. The stock was purchased from Electric Power & Light. (See comment on the prospectus, page 236, in this department.)

TRANSIT COMPANY STOCKS

	Where Traded	*Price About*	*Recent 12 Mos.*	*Share Earn. Amount*	*Price-Earn. Ratio*	*1945 Div.*	*Yield About*
Baltimore Transit	O	6	Sept.	$1.52	4.0	(a)	..
Dallas Ry. & Term.	O	24	Oct.	3.07	7.8	$1.40	5.9%
Los Angeles Transit	O	11	June	1.65	6.7	..	..
Rochester Transit	O	11	Dec. '44	1.43	7.7	1.00	9.1
Syracuse Transit	O	31	Dec. '44	4.23	7.3	2.00	6.5
Twin City Rapid Transit	S	18	Sept.	3.43(d)	5.3	(a)	..
Kansas City Pub. Serv.	O	8	Sept.	5.32**	..	.30	3.8
Third Avenue Transit	S	13	Sept.	D.15	..	(b)	..
St. Louis Pub. Serv. "A"	O	21	Nov.	1.40	15.0	1.00	4.8
Eastern Mass. St. Rys.	O	8	Oct.	3.38	(a)	(a)	..
Capital Transit	O	34(c)	Dec. '44	3.44	9.9	2.00	5.9
Phila. Transportation	O	9	Sept.	.84	10.8	.80	8.9
Duluth-Superior Transit	O	12	Dec. '44	2.96	4.1	NA	..
Cincinnati St. Ry.	O	16	Dec. '45	1.54	10.4	1.40	8.8
National City Lines*	C	27	Sept.	2.12	12.8	1.00	3.7
Chic. So. Shore & So. Bend	O	16	Nov.	2.10	7.6	1.20	7.5
Market St. Ry. pr. pfd.	S	20	Dec. '44	.70	†	..	..

S—Stock Exchange. C—Curb Exchange. O—Over counter, or out-of-town exchanges. *Holding company controlling a number of bus lines over separate local systems. **Before income taxes and contingencies. †Company being liquidated. (a) Arrears on preferred stocks. (b) Full interest not paid on income bonds. (c) Recent quotation not available. (d) *Pro forma*. NA—Not available. D—Deficit.

What Others Think

Senators Debate Need of California Federal Power Line

WHEN the Senate considered the First Deficiency Appropriation Act, 1946, last December, the question of providing funds for the construction of transmission lines on the Central Valley (California) project of the Reclamation Bureau was debated at some length.

This matter of building transmission facilities, as recommended by Interior's Bureau of Reclamation, has been before Congress several times. Heretofore, it has been turned down, upon the evidence presented before Senate and House committees that the facilities of Pacific Gas and Electric Company are available for the distribution of Central Valley power —Shasta dam power—upon terms which are advantageous to that Federal project. To build additional transmission lines was argued to be uneconomic, and an unnecessary expenditure.

This recent appropriation, however, of $730,000 for a 230-kilovolt transmission line from Oroville to Sacramento (represented by the Reclamation Bureau as necessary to carry power for irrigation pumping) was approved by the House. In the *Congressional Record* (December 13, 1945, pages 12,302-12,308) is reported the Senate debate on this item. It will provide the first section or "leg" of a proposed grid to cover the lower Central valley area to the bay section. A perusal of this debate discloses interesting side lights upon the views of certain Senators as to congressional policy regarding the disposal of surplus electric power from Federal hydro projects. The following extracts from the *Record*, reflecting the debate upon various angles of this controversial question, make instructive reading. The opening statement was made by Senator Carl Hayden (Democrat, Arizona):

> An examination of the bill will show that the House of Representatives, recognizing the need for transmitting power from Shasta dam down into the Central valley, a distance of approximately 200 miles, has approved an appropriation of $730,000 to build a transmission line for that purpose. In the House report the statement is made that the purpose of transmitting this power is to make it available to pump water up to the farm lands in the San Joaquin valley. . . .
>
> All during the war there was no construction of transmission lines in the Central Valley project because of the great need for materials and men. A wartime arrangement was made between the existing power company, which operates in northern California, the Pacific Gas and Electric Company, and the government, under which the government arranged to carry over the lines of the power company the power then developed, down to San Francisco and the bay cities to be used in war work. The understanding was that there would be no loss to the company and no advantage to the government as a result of that temporary arrangement. So every proposal which has been made during the past four years to construct a transmission line in that area has been set aside by the House of Representatives until the end of the war.
>
> The war being over, the House of Representatives, recognizing the need, placed this appropriation item in the bill, and I believe that the Senate should go along with the House. . . .
>
> MR. REVERCOMB [Republican, West Virginia]. I have listened with great interest to the very clear statement of the Senator. Am I correct in concluding that the entire beneficial effect of construction of this line would occur in one valley within one state? As I understand, the result would not be to benefit a large area of the country. It would not be something of national interest, but would be solely for the purpose of building a transmission line into a valley in California. . . .

IN response to this query by Senator Chapman Revercomb, Senator Hayden said, "We are laying down a principle, I may state to the Senate, which

is national in scope." In those few words is found a concise statement of the prevailing viewpoint among proponents of public power. The following analysis which Senator Hayden then presented of the Central valley situation casts further light upon that viewpoint:

> Wherever a dual-purpose dam is constructed in the United States, that is to say, when we construct a dam which controls a stream so as to prevent floods and impounds water in that connection, and the water impounded behind the dam can gradually be let out, through hydroelectric power facilities, thus creating electric power, the government building the dam and the power plant can receive revenue from it. If we are to say that, having built a dam of that kind, the government is forbidden by a policy of Congress to transmit the power away from the dam to any other place, if there is an existing public utility which can carry it, that will mean that the government must not build a transmission system which will compete with or take business from an existing public utility.
>
> In other words, Mr. President, the dispute here really narrows down to this question: Is it necessary to build this transmission line in order that the power generated at Shasta dam may be carried from that dam into central California, or can that purpose be accomplished by transmitting the power in a roundabout way over the existing transmission lines owned by the Pacific Gas and Electric Company? That is where the dispute arises. The power company admits that it does not have the lines now, but it claims that by combining its lines with other lines and placing them all under its control, it could handle the matter better and with greater advantage to the community than the Federal government could do by building transmission lines. I wish to place in the *Record* the proof of the statement that the building of a new transmission line will be required.

REFERRING then especially to the question of disposal of all power solely to Pacific Gas and Electric Company, the debate discloses these interesting and contrasting views:

> MR. HAYDEN. The point is that the Congress authorized the construction of this project for several purposes—for flood control; for improvement of navigation on the Sacramento river; to prevent tidewaters from drowning out lands in the delta, and thus making them salt; to provide hydroelectric power and for other purposes; and work . . . has been carried on for some time.
>
> In connection with the issue which is presented here, let me say that it is urged on the part of the private power company that it should be the sole purchaser of the power from Shasta dam, that it is now so situated that it is taking the limited product from the dam—the power there is not fully developed—and that it can expand its transmission line facilities so as to be able to take all of it.
>
> MR. WHERRY [Republican, Nebraska]. The company has offered to buy all the power which the Shasta dam will provide.
>
> MR. HAYDEN. I do not question that.
>
> MR. WHERRY. I understood the Senator to say that the company is not taking all the power.
>
> MR. HAYDEN. That is because all of it has not yet been developed or generated.
>
> MR. WHERRY. But I think it should be pointed out that the company stands ready to take all the power.
>
> MR. HAYDEN. There is no doubt about that.
>
> MR. WHERRY. If the rate which the company agrees to pay for the power is not satisfactory to the Federal government, the company will agree to let the Federal Power Commission fix the rates; is not that true?
>
> MR. HAYDEN. There is no doubt about that.
>
> MR. WHERRY. . . . Mr. President, a committee of which I was a member went to California and considered this whole matter. We interviewed representatives of both sides of the controversy, and we heard their views. I wish to have the Senator keep the record straight. From what the Senator said, I received the impression that the company would not take all the power.
>
> MR. HAYDEN. I had no intention of making such a statement. . . .
>
> MR. WHERRY. I know the company is perfectly willing to take all the power which is developed at the Shasta dam, and is willing to take it at rates which are determined by the government agency, and the company will distribute all the power over its own transmission lines. The only question is whether the government wishes to build a competing transmission line. . . .
>
> MR. HAYDEN. The question is whether we are to build a tremendous storage reservoir and a very large power plant—one developing 120,000 kilowatts, which is an enormous amount of power—and whether we then are to arrange to have only one purchaser for the power; in other words, take such action that no one except the public utility which now monopolizes the field in northern California can buy the power. That is the proposition which is presented by those who feel that the Federal government should not engage in the transmission of power. They honestly believe, as does the Senator from Nebraska, that the private

utility can serve the community better than the government could, and that the government would thus avoid the expenditure of the money which a transmission line of that kind would cost.

So the issue is whether we wish to make the enormous investment in dams and power plants, with the certainty that we shall have but one purchaser. I do not believe that is good public policy. . . .

The question as to whether the proposed Oroville - Sacramento line will compete with facilities of Pacific Gas and Electric brought forth decided differences in opinion in this debate. Mr. Hayden said:

Mr. President, I wish to make it perfectly clear that the building of the transmission line as provided for by the House of Representatives will not result in a duplication of the facilities which the power company has on hand. I shall read from the record of the hearings which I held as chairman of the subcommittee handling the Interior Department appropriation bill last July. I first read from the testimony of Mr. Warne, who represented the United States Reclamation Service:

"I should like to point out that there are no transmission lines now in existence which would be capable of delivering the 120,000 kilowatts of required power from any source to our proposed pumping plants on the Delta Cross channel, Delta-Mendota, and Contra Costa canals."

The Reclamation Service flatly asserts that there are no transmission lines in existence today which can do that job. . . .

SENATOR Joseph H. Ball (Republican, Minnesota) voiced quite a different view of this matter, and quoted the testimony of James B. Black, Pacific Gas and Electric's president, as to the duplication with that company's facilities which will result from the construction of the proposed public power line:

MR. BALL. In his testimony with regard to this particular item of $730,000 for an extension of the Oroville line to Sacramento, Mr. Black said, on page 525 of the hearings, as follows:

"Moreover, a line from Oroville to Sacramento and to the pumping plants will be a clear duplication of a company line already in operation and now used in connection with the transmission of Shasta power. There is also a vacant position on the towers which carry this line on which the company can install additional wires at a cost of $900,000. With this expenditure the company can do what under the bureau's estimates would cost the government $3,500,000. Here is a waste of $2,600,000 which must be carried by the water users on the project or the Federal taxpayers of the nation."

MR. HAYDEN. Mr. Black was merely talking about the initial expenditure.

MR. BALL. No; he stated flatly that this is a line now having a vacant position on the towers. That is what he stated, if I can read English.

MR. HAYDEN. In order to do the entire job it would cost his company approximately $22,000,000. It was claimed that it would cost the government more money.

MR. WHERRY. But the appropriation is one for a transmission line that would duplicate the present system.

MR. HAYDEN. No. I have presented what evidence I can to the Senate to the effect that there would be no duplication.

SENATOR Wherry then added his voice in opposition to the statements of Senator Hayden:

I agree with the statement that from the present point on to the point where it is to be built, the question to which the Senator has referred may be involved. I am talking about the appropriation which has been requested in this bill. I contend that there would be a duplication. Here is the testimony, on page 523:

"The requests now made are intended to commit Congress to a plan to parallel and duplicate existing facilities of this company."

What language could be plainer than that?

MR. HAYDEN. The testimony which appears in the next volume of the record which, unfortunately, has not been printed—

MR. WHERRY. The Senator does not mean to say that Mr. Black has changed his testimony, does he?

MR. HAYDEN. Not at all. I am merely saying that all along we have had this dispute between Mr. Black and his engineers on the one hand, and the engineers of the United States Reclamation Service on the other. The question remains, do we want to insist that at this dam there shall be but one customer for the purchase of power?

If the Senator believes that the Pacific Gas and Electric Company is a well-managed and well-supervised power monopoly, he will vote to strike out the amendment. If he believes on the other hand that the Federal government should have more than one customer for its power, he will vote to spend money for the purpose of building a transmission line for a distance of approximately 200 miles in the Central California valley. In my judgment it would result in a great saving to the landowners and to the farmers.

"AND MRS. JONES WOULD LIKE TO KNOW HOW TO KEEP HER HUSBAND FROM TAKING HER MARBLE CAKE TOO MUCH FOR GRANITE!"

A rather extended statement was made by Senator Sheridan Downey (Democrat, California), dwelling principally upon the prospective benefit the proposed Federal transmission line would bring to the city of Sacramento, which wants to substitute municipal electric service with power to be taken from Shasta dam for that now rendered for many years by Pacific Gas and Electric Company. This statement elicited the following significant comment from Senator Chan Gurney (Republican, South Dakota):

> Bearing out the Senator's statement about the Sacramento Utility District, in the testimony before the committee, Mr. Black made this statement:
>
> "If the suit were decided tomorrow in favor of the district it would take many months to work out the physical details of transferring the property. Furthermore, the district has stipulated in the condemnation proceedings that it will purchase its power requirements from the company for a period of two years after the next June 30th following the acquisition of our property."

There then ensued an exchange between Senator Alexander Wiley (Republican, Wisconsin) and Senator Downey, in the course of which Senator Wiley made some observations upon the problems to be faced by business-managed utilities when portions of their electric systems are taken over by municipalities or other public power agencies:

> MR. WILEY. I must admit my ignorance about the facts, as I am not a member of the committee which has been giving consideration to this matter, but, inasmuch as the distinguished Senator lives in California, I should like to ask him one or two questions.

It is his judgment, I understand, that people in Sacramento will in the near future obtain what is called the distributing system?

MR. DOWNEY. That is correct.

MR. WILEY. I have heard the discussion on the floor by several Senators, and I wish to know whether or not in the Senator's opinion the present transmission line adequately supplies power to the communities which need it.

MR. DOWNEY. I am not certain I thoroughly understand the Senator. There undoubtedly will have to be additional transmission lines constructed to bring the power down from the dam into the valley. In frankness, I must say I think there is no doubt that if the public constructs the transmission line it will, to a certain extent, I would say to a material extent, duplicate the transmission facilities of the Pacific Gas and Electric.

MR. WILEY. The Senator has anticipated my third question. The fourth question is that the Pacific Gas and Electric is largely owned, is it not, by stockholders in California?

MR. DOWNEY. I wish I could say that that is true, but there are a great number of stockholders of both common and preferred stock of the Pacific Gas and Electric all over the United States. It is a listed stock, I think, on the New York Stock Exchange, considered one of the blue chip stocks. Its bonds also are considered very high class, and I think they are owned all over the United States.

MR. WILEY. I could put the matter this way, then, that a large group of citizens of the United States owns the stock of this company, and that the stock is largely distributed.

MR. DOWNEY. I believe it is; yes.

MR. WILEY. The proposition here, then, as I gather it from the discussion I have heard during the last few minutes is for the government to spend about $70,000,000 to build transmission lines, and when built——

MR. DOWNEY. If the Senator will permit me to interrupt him, a stand-by steam plant is included.

MR. WILEY. And a stand-by steam plant, which, when built, will directly come in competition with the investments of the ordinary citizens in the stock of this company.

MR. DOWNEY. I would say that there is no doubt of that. I might say to the distinguished Senator that I think one of the strongest arguments for municipal ownership of power plants is that it makes it possible to have a measuring stick by way of competition, so that it may be determined what rates public power companies should charge. I might say we have in Los Angeles the same kind of public ownership as that for which the people in Sacramento and the people in other places in California are seeking, and in the case of Los Angeles the business has been very profitably and very efficiently conducted. . . .

MR. WILEY. I think the Senator misunderstood me. I thought the Pacific Gas and Electric owned its distribution system, that its transmission lines were transmitting current to each community, and that the transmission system was owned generally by the Pacific Gas and Electric Company. Am I correct? If that be so, if we take away from the Pacific Gas and Electric Company the business of furnishing current to these communities, whether the systems are publicly owned or privately owned, we are taking away from it a source of revenue, and thus we are injuring the rights of the citizen in the stock which he may own. That is what I am getting at.

MR. DOWNEY. Let me express this opinion: Certainly, so far as I know, there will be ample market in northern California for all the power which can be produced by this public project, and likewise by the Pacific Gas and Electric Company. In other words, the mere fact that the public is in operation there will not prevent the Pacific Gas and Electric from finding a market for what it produces. . . .

ANOTHER interesting angle to this continuing effort by Interior's power representatives to build and extend their own transmission system in California, and the effect, were such a policy approved by Congress, upon the tax-paying citizens of the other 48 states, were pointed out by Senator Wiley:

So far as I know, in the state of Wisconsin, there are no government-owned transmission lines. But if, as suggested by the Senator from West Virginia, the state of Wisconsin should want to start to build transmission lines, and the Federal government is going to begin to give to the various states sums up to $70,000,000 with which to build transmission lines in order to compete with companies which are already rendering wonderful service, as the Senator admits is done in California, then I think it would be pretty nice if we in Wisconsin could have $70,000,000 expended by the Federal government, because when that is done it always means cheaper rates necessarily; it generally means that that much capital is not counted when the rates on electricity are fixed. But in this instance, there is a company which is in existence, which is providing transmission lines which are adequate for present needs, and willing to supplement its lines to meet any future needs, and since there is no criticism respecting company service, why

should the Federal government, when we are now spending so much money, reach out and spend $70,000,000 more? Citizens naturally would be benefited there, but, if we are to do the square thing, we should expend $70,000,000 in each of the other 48 states. . . .

MR. DOWNEY. Before taking my seat I desire to clarify my own position in respect to one or two matters. Of course the distinguished Senator from Wisconsin understands that this is not a gift from the Federal government, but is a reimbursable item, and we are quite positive that the installation of this transmission line will be profitable from a financial standpoint.

MR. WILEY. Is it needed?

MR. DOWNEY. . . . I merely want to repeat that I think the overwhelming majority of the people in this area desire this project. We feel very keenly that with hundreds of millions of dollars invested in this project it would not be wise policy so to bottle up the power that at some future time it would be entirely at the mercy of one monopoly, but it should be so held that the people of the state of California may cause it to be distributed in ways which they may think expedient and desirable.

TOWARD the close of this Senate debate, Senator Ball made an exceptionally concise statement of the principal points at issue in the Central Valley situation, as will be seen in this extract from the *Record*:

The point here it seems to me is not that this is a monopoly. We all know that a monopoly in the public utility field, particularly in the power field where it takes vast sums to build a power grid so that the supply of power can be used efficiently, provides the most efficient and economical method of operation. That is why we have monopolies, and we have them under public regulation. I might say that the testimony before the committee was that the utility rates in California are considerably the lowest average rates in the nation. . . .

The question here it seems to me is this: Is there any evidence whatever that the Pacific Gas and Electric, which admittedly has or is prepared to build whatever facilities are necessary in the next twenty years to transmit all the power that Shasta dam will produce wherever it is needed, is trying to gyp the government either by paying less than it should for the power or by charging consumers more than it should? There is not the slightest bit of evidence on that point.

Mr. President, all the evidence is that the price which Pacific Gas and Electric is paying the government is fair, that under a contract with the Bureau of Reclamation it is delivering power to the pumping plants wherever it is necessary at rates which actually save the government money compared to what it would have to pay if it built its own line.

The company has offered to sign a contract to purchase all the power which may be produced at the Shasta dam and distribute it over its own system at whatever price is determined to be fair, by the California Railroad Commission or the Federal Power Commission.

So it seems to me that before we start spending $70,000,000 we should consider what we are doing. I believe that the opponents of the committee amendment have by implication admitted what was charged in the hearing; namely, that this little $730,000 item is a camel's nose under the tent which will commit the Congress to an eventual expenditure of $70,000,000 for a duplicate transmission system.

ANOTHER Senator, a member of the Senate Committee on Appropriations, Mr. Gurney, gave not only factual data on the present situation, but also outlined some illuminating history with references to certain activities by Interior in the past in the construction of a transmission line on this Central Valley project:

Mr. President, as I recall, I first became a member of the Committee on Appropriations in 1941. At that time there was pending a controversy somewhat similar to this one. The committee held hearings for a few days. There was full testimony and a large attendance. Many representatives from California appeared before the committee. At that time there was a request to build a portion of this proposed transmission line. I visualize a map of California about 12 inches high. There was then a request from the Bureau of Reclamation to build a line down to what is known as the Oroville switchboard or substation. Oroville would be approximately an eighth of an inch down on the 12-inch map. As I remember, the bureau was then asking for an appropriation of a few million dollars to build that section of the transmission line.

We heard all the testimony, and the committee decided against it. If my memory serves me correctly, the Senate decided against it, and it was specifically agreed in conference, as set forth in the report, that no Federal funds should be used to start building that transmission line. None of the funds appropriated under that act were used, but from unexpended balances previously appropriated the line was built down to Oroville. I believe the record will bear me out in the statement that that is how the transmission line was started.

WHAT OTHERS THINK

We now have before us a request to extend the line down along the Sacramento river into the San Francisco bay area. Why are we asked to do that? Because it is all a part of one project. . . .

The testimony is quite clear that distribution of power can be done more cheaply by the utility company which is now doing business there. Why would it be cheaper? I think the reason is very clear. Two persons starting to build the same service line could probably build it at about the same cost. But when it comes to the question of production and distribution of electric power the situation is different. The existing companies all have hydroelectric plants and steam plants to firm up the power and make it available twenty-four hours of the day, three hundred and sixty-five days in the year. This new proposal means that should the government build a transmission line it would have to build a steam plant to make power available at all hours of the day. That is why such a project would cost more. To me it is a matter of simple arithmetic.

This is not a new project. Most of the information has been given in the colloquy today; but I wish to tell the Senate that this is the same project about which our former colleague, Senator Burton, spoke last year. I am sure that the Senate will be doing the right thing if it takes the same action this year that it took last year, when we heard such a fine explanation of the project from our former colleague, Senator Burton.

SENATOR Hayden again pressed his views in favor of this transmission line appropriation:

Mr. President, the Senator is mistaken in one respect. Whenever this issue has been presented to the Senate it has always voted in favor of the construction of transmission lines. The House has been opposed, and it has only been in conference that failure to appropriate has resulted. On every occasion on which the question of constructing a transmission line in the Central valley has been fairly presented to the Senate up to the present time the Senate has voted to proceed with the project. We would go to conference with the proposal, and the House conferees would say, "No; we are not doing it that way." I so stated at the beginning of my remarks.

Now, for the first time, the House has adopted the position of the Senate. It has approved an appropriation for a transmission line. The House having changed its mind, and having adopted what has heretofore been the view of the Senate, I hope the Senate will go along with the House.

The debate in the Senate on this question was then ended by the remarks of Senator Wherry in opposition to the appropriation:

All I wish to say is that on every occasion when this question has arisen in the Senate Committee on Appropriations the Senate committee has turned it down. That is where the testimony is taken, and that is where we get a frank expression of the issues at stake. Last year and this year the committee turned down the item, and now it is brought to the floor of the Senate.

The item involves more than merely an appropriation of $730,000. The distinguished Senator from Arizona knows that to be so. This is the beginning of an appropriation to build a steam plant and transmission lines involving appropriations of more than $70,000,000. That is the question on which we are voting this afternoon. So I feel that the Senate ought to know that the Senate committee which has handled this matter and heard testimony on it at least twice since I have been a member of the Senate, and has voted upon it, has turned it down. As I have said, the evidence is considered before the committee. The witnesses appear before the committee; and the committee has decided that this project should not be approved.

WHEN the Senate came to vote upon the appropriation of $730,000 for this Oroville-Sacramento transmission line, the result reported in the *Record* was 38 in favor of it, 27 opposed, and 31 not voting. Among the latter were listed the names of several Senators as "absent on official business," a number of whom have heretofore disapproved such appropriations.

It would appear that even though this particular appropriation had been passed by the House, and, after approval by the Senate, was agreed to by the Conference Committee, this action does not necessarily indicate that a majority will eventually approve Interior's entire program to construct extensive transmission systems for its various Federal power projects.

The statements of Senators who approved this expenditure show a clearer understanding of the economics in the situation than in former years. Perhaps this was due to their familiarity with the testimony submitted to the Appropriations Committee by James B. Black, president of Pacific Gas and Electric Company.

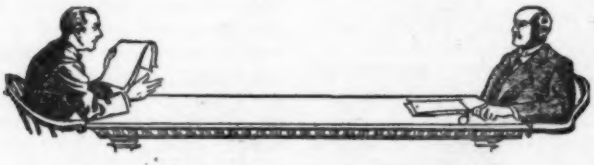
THIS testimony covered the proposals of Pacific Gas and Electric for the purchase and the distribution, through that utility's extensive transmission system, of all electric energy generated at Shasta and Keswick dams of the Central Valley project, on terms demonstrably more advantageous to the Reclamation Bureau than if it were to build its own transmission lines.

In his testimony Mr. Black presented a comprehensive picture of the facilities of this long-established, business-managed utility company, which by reason of its many interconnected hydro and steam plants, and a network of transmission lines, supplies a broad area with electric service. Through these extensive facilities, it was stated, Pacific Gas and Electric stands ready to make wide distribution of all Central Valley power.

As a contribution to the better understanding of this question of the Federal government entering into competition with private enterprise in the disposal of power from its hydroelectric projects, the statement by Mr. Black on this Central Valley situation makes instructive reading. In going over it, the impression is gained that possibly if more such factual and complete presentations were made to members of Congress, as to the actual conditions prevailing in relation to proposals for construction of Federal power lines, it would prove of practical assistance to them in determining whether or not such projects are necessary.

The statement by Mr. Black is printed in full, on pages 522-545, in the report (Part I), of the hearings before a subcommittee of the Committee on Appropriations of the Senate on HR 4805—the First Deficiency Appropriation Bill for 1946. Copies of this report may be obtained from the United States Government Printing Office, Washington, D. C.

—R. S. C.



Problem of Industrial Relations

"THE public interest in industrial relations . . . is not confined to the railway and public utility fields. Some industries are so essential to public health and welfare that, as a matter of practical necessity, they must be kept operating in one way or another. Other industries are so large, so highly centralized, or so strategically placed in the general economic structure that a prolonged suspension of their operations would constitute a public calamity. When an industry employs hundreds of thousands of workers, and when those workers are subject to a single labor leadership, so that the entire industry, along with others dependent upon it, can be paralyzed for indefinite periods, a dispute in that industry cannot be treated as if it were a matter of concern only to the labor and management units that are parties to it."

—EDITORIAL STATEMENT,
The Guaranty Survey.

The March of Events

Joint Survey Planned

ANNOUNCEMENT of a Department of the Interior study of the power market and supply of the basins of the Snake river and tributaries down to and including the Salmon river, to be conducted jointly by the Bureau of Reclamation and the Bonneville Power Administration, was made last month by R. J. Newell, regional director for the bureau, and Paul J. Raver, Bonneville Power Administrator.

The objective of the survey, according to a directive issued to both agencies by Secretary of the Interior Harold L. Ickes, is to provide for the maximum over-all development of this area "through the construction of the multiple-purpose water conservation projects planned by the Bureau of Reclamation and through the availability of the low-cost electric power from the Columbia river system."

The agencies will submit recommendations leading to the most effective power construction program for the basin, consistent with the full development of the area, including dams, generating and transmission facilities, as well as proper wholesale rates to be charged for power in the area by the Department of the Interior, the announcement stated.

The region to be covered in the study will include part of eastern Oregon, all of southwestern and southeastern Idaho, and small portions of Wyoming, Utah, and Nevada.

Work on the report was to be initiated immediately and will be completed during the late summer or fall of this year.

Whatcom Holds up Deal

SALE of Puget Sound Power & Light Company properties into public ownership last month appeared dependent entirely upon final action of one remaining public utility district, the Whatcom County Public Utility District, which thus far was said to be blocking completion of the transaction and may stalemate it.

This became apparent recently when PUD officials reported that Whatcom PUD officials were refusing to sign contracts for the purchase with 14 other districts, and some observers in power circles in Seattle, Washington, expressed strong belief that the transaction may be headed for the scrap heap.

On the other hand, proponents of the transaction emphatically asserted that negotiations are by no means stalemated. They asserted that the Whatcom County District's prime consideration was arrangement of a contract which would enable it to purchase power directly from the Bonneville Power Administration. To this, it was said, other participating PUD's have agreed and conferences with Dr. Paul J. Raver, Bonneville Administrator, were conducted on January 21st at Portland, Oregon, to work out this detail. A similar meeting was held at Seattle on January 19th.

Objections of the Whatcom PUD, which, with the Snohomish County District, hired a Chicago engineering firm to conduct a survey of the transaction, are based primarily on an asserted "overvaluation" of generation and transmission facilities in Seattle's metropolitan area.

The Snohomish County District finally joined with other PUD's of western Washington on December 29th in signing the contract for the purchase after ordering the survey.

The report, observers who are close to the transaction pointed out, stated that the valuation of $60,897,000 on the generation and transmission facilities is "inflated," and ultimately will result in an increase in power production costs. One official expressed doubt that the Whatcom commissioners would be willing to participate in the transaction because of this.

Guy C. Myers, New York promoter who represents the PUD's in the transaction, expressed confidence that the deal would be completed.

The Chicago firm's report placed Seattle's share in the transaction at about $33,000,000, which would have to be paid for PSP&L properties in the metropolitan area. Observers said that an apparent unwillingness in official city quarters to pay more than a $20,000,000 top price also has caused the Whatcom PUD to balk at entering the deal.

Plan Goes to Bankruptcy Referee

FEDERAL Judge James A. Fee has referred to Estes Snedecor, referee in bankruptcy, the second alternative plan for a reorganization of Portland Electric Power Company, approved last month by the Securities and Exchange Commission.

Prior to submitting the plan to the court, counsel for the independent trustees, as ordered by the SEC, filed an amendment reserving the right prior to the plan's consummation

to ask SEC and court approval to sell stocks of Portland General Electric Company and of Portland Traction Company, and to distribute cash proceeds to debt holders in lieu of distributing the portfolio stocks to them direct.

Counsel for the SEC endeavored to have argument confined solely to the second amended plan as approved by the commission, but this request was refused by the court on the ground that parties interested in other plans should be heard.

SEC Opens Way to New Plans

THE Securities and Exchange Commission on January 24th announced in a memorandum opinion that it would withhold for thirty days further proceedings in connection with the recapitalization plan of the Commonwealth & Southern Corporation. During that period, it said, Commonwealth & Southern or any person having a bona fide interest in the reorganization may file a plan for compliance with the commission's order of April 9, 1942, based upon the principle of retiring the preferred stock through the sale or other disposition of assets.

As soon as possible after the expiration of the 30-day period, the commission said, it "will either issue a notice and order reconvening the hearings in this matter or take such other action as may be appropriate to secure enforcement of our § 11 (b)(2) order."

The commission set February 26th for the reopening of a hearing being conducted to determine whether the registration of the $2 par value capital stock of Transamerica Corporation should be suspended or withdrawn. The hearing will be held in the SEC's regional office in San Francisco, with Day Karr as trial examiner.

Files with FPC for Authorization

THE Federal Power Commission has received (1) an application from the Hope Natural Gas Company, Clarksburg, West Virginia, requesting authority to construct and complete by December 1, 1946, a number of major additions to its present transmission system in West Virginia in order to meet the alleged increasing demands of its wholesale customers, principally the East Ohio Gas Company, an affiliate, and (2) an application filed by the East Ohio Gas Company, of Cleveland, Ohio, for permission to construct a 144-mile pipe line extending from Hope's outlet at the Ohio-West Virginia state line to the outskirts of Cleveland, Ohio. The estimated cost of the Hope constructions is $5,237,500 and that of the East Ohio Company, $4,620,000.

According to Hope's application, it has, along with other independent producers, been prospecting for several years for gas in Wyoming county, West Virginia, and "considerable reserves have been discovered." The company was said to be carrying on negotiations with the independent producers in Wyoming county for long-term contracts for the purchase of natural gas and is itself engaged in extensive drilling in that area.

The application states that the unprecedented demands of domestic customers during the present winter and the prospect of continued increases necessitate the connection of these reserves to its system during the present year. It added that in a second effort to meet the increased demands, Hope has entered into negotiations with Tennessee Gas & Transmission Company for a long-term contract through which it would be supplied with an additional 25,000,000 cubic feet of natural gas per day from the additional facilities Tennessee is seeking to acquire and operate in its application filed under Docket No. G-678.

The application stated that the company, during the war years, had built up its transmission system to a deliverability of over 400,000,000 cubic feet per day and did not contemplate more than minor additions to its system. However, applicant added, experience during the present winter shows that domestic consumption is far outstripping previous forecasts and estimates that by the winter of 1946-47 the requirements will be well beyond its ability to deliver. The company deems it essential that construction of the proposed facilities should begin as soon as possible.

FPC Suspends Proposed Increases

THE Federal Power Commission on January 17th announced an order and opinion (No. 127) suspending proposed rate increases filed by the North Penn Gas Company and its affiliate, the Allegany Gas Company, both of Port Allegany, Pennsylvania, for the sale of natural gas at wholesale to customer companies in Pennsylvania and New York. The suspension was ordered because the rates as proposed would result in "undue and unlawful discrimination" by reason of the wide variation in costs to the interstate wholesale customers. The increases are claimed by the companies to be necessary principally because the diminished local supply of natural gas necessitates the transportation of gas from West Virginia and Texas.

According to the opinion, the proposed rates would produce revenue about equal to the cost of service, "and rate schedules producing approximately the same revenues, but without the discriminatory feature of the suspended schedules, would be reasonable." The rates determined as reasonable by the commission would provide approximately the same revenue as those proposed by the company but without the discriminatory features. The order and opinion established as reasonable to interstate wholesale customers a rate of 44 cents per MCF

for the first 1,000 MCF per month, 42 cents per MCF for the next 44,000, and 40 cents per MCF per month for all over 45,000. These rates, according to the commission, will distribute equitably the cost of service among the subject customers and North Penn and Allegany were ordered to file new schedules by February 1st setting forth the rates above, which will be effective on all bills rendered after that date.

SEC Approves Plan

TRANSACTIONS outlined in a joint proposal of the American Light & Traction Company and its subsidiary, the Madison Gas & Electric Company, for refinancing the latter company were approved recently by the Securities and Exchange Commission.

Under the now authorized plan, Madison intends to sell at competitive bidding $4,500,000 of first mortgage bonds, due on January 1, 1976, and to use the proceeds to redeem $3,400,000 of first mortgage bonds, 4 per cent series, due in 1960, at 104.5 per cent plus accrued interest; to redeem 5,000 shares of 6½ per cent $100 par value, series A, preferred stock, at $105 a share plus accrued dividends; and to provide additional funds for plant construction.

Madison also will amend its articles of incorporation to change its authorized common stock from 30,000 shares of $100 par value to 300,000 shares of $16 par value, and will issue 187,500 shares of the new common stock in exchange for the 30,000 common shares now outstanding.

American Light, which owns all but 8 of Madison's outstanding shares of common stock, will receive 276,805 shares of the new common stock, including 89,305 shares as a stock dividend. The reclassification of Madison's common stock, it was pointed out, will facilitate the distribution of the security to the common stockholders of American Light in accordance with the latter's pending plan of liquidation and distribution of assets.

Natural Gas Rates Reduced

THE Federal Power Commission last month announced its orders (1) accepting new rate schedules filed by Colorado-Wyoming Gas Company which reduce its interstate wholesale natural gas rates by $284,224 a year based on 1944 volume of sale, and (2) accepting schedules filed by Canadian River Gas Company cutting its rates for gas sold in interstate commerce to the Clayton Gas Company for resale by $11,803 annually on the basis of 1944 sales. In accordance with the commission's order of March 18, 1942, Colorado-Wyoming's new rates are to be made effective on all bills rendered on and after June 15, 1942, and Canadian River's will be effective from May 20, 1942.

As a result, Colorado-Wyoming will be required to refund to customers in Colorado and Wyoming $885,000, representing the difference between the reduced rates which the commission ordered be put into effect in June, 1942, and the rates the company has continued to charge from June, 1942, to December, 1945.

In the case of the Canadian River Company that company will refund approximately $40,000. This represents excessive charges which Canadian River has continued to collect from the Clayton Company of Clayton, New Mexico, during the 3-year period in which it unsuccessfully contested the commission's rate reduction order in the courts.

On April 2, 1945, the U. S. Supreme Court upheld in all respects the FPC order of March 18, 1942, in so far as it dealt with Canadian River Gas Company, and upheld it in part in respect to the Colorado-Wyoming Gas Company.

The new rates filed by Colorado-Wyoming Gas Company will effect a 30 per cent reduction in the company's revenues from the sale of gas to the Cheyenne Light, Fuel & Power Company, Greeley Gas & Fuel Company, and Public Service Company of Colorado. The approved schedule has a demand charge of $1.70 per month per MCF of billing demand and a commodity charge of 18.25 cents per MCF. Actual revenue per MCF sold during the period from June, 1942, through December, 1945, averaged 41 cents per MCF and under the terms of the new rates this will be reduced to 29 cents per MCF.

For the period from June, 1942, to December, 1945, Colorado-Wyoming will refund $885,078 to its three resale customers under the approved rate. Colorado-Wyoming's cost of gas purchased from Colorado Interstate Gas Company during this same period was reduced by $791,847 as a result of FPC action. During the same period Colorado-Wyoming has impounded $75,250 with the circuit court.

The new schedules filed by Canadian River Gas Company will effect a reduction of 39 per cent in the rates charged for gas sold in interstate commerce for resale to its affiliate, the Clayton Gas Company. The approved rate provides for a charge of 14½ cents per MCF of gas for general service and 9½ cents per MCF for industrial service.

Under the approved rates the Clayton Gas Company, which serves Clayton, New Mexico, will be entitled to a refund of approximately $40,000 for the period from May, 1942, through December, 1945.

FPC Hearing Postponed

THE Federal Power Commission recently announced it had postponed to March 25th the hearing previously set for February 4th to determine the reasonableness of interstate wholesale electric rates charged by Pennsylvania Water & Power Company and its wholly owned subsidiary, Susquehanna Transmission

Company of Maryland. The postponement was made at the request of the Maryland Public Service Commission, and the hearing will be held in the FPC hearing room, Washington, D. C.

The investigation of the rates of Pennsylvania Water & Power Company was instituted as a result of petitions filed by the Maryland Public Service Commission; counsel for the mayor and city council of Baltimore, Maryland; county commissioners of Baltimore county, Maryland; Bethlehem-Fairfield Shipyard, Inc.; and Rustless Iron & Steel Corporation.

The investigation was later enlarged to include the rates subject to FPC jurisdiction charged by Susquehanna Transmission Company of Maryland.

Alabama

Plans New Construction

CONTINGENT upon its ability to obtain necessary materials and equipment and adequate man power, the Alabama Power Company will spend more than $8,000,000 for construction purposes during 1946, President Thomas W. Martin announced recently.

Expenditure of that amount has been approved by the company's board of directors, he said.

With approximately half of the $8,000,000 to be used in building rural electric lines and facilities, Mr. Martin estimated that the company will have built 3,200 miles of new rural electric lines by the end of 1946.

Expenditure plans call for construction of a number of new substations to increase power capacities where needed, and for the purchase of new equipment for several generating plants.

Experiments in furnishing telephone service over rural power lines, a recent development in the communications field, will be continued jointly with the Southern Bell Telephone Company.

Racial Segregation Ordered

ALABAMA railroads were ordered by the state public service commission last month to furnish separate accommodations and facilities for white and Negro passengers "as provided by law."

The commission amended its recent segregation order which had provided that "colored persons requesting berth or seat space" be assigned to enclosed accommodations if available, or separated from other passengers by partitions or curtains.

The order, protested at a hearing January 14th by a group of Negroes who contended it infringed upon "human rights and fundamental freedom," was scheduled to become effective February 1st.

California

OPA Action Blamed on Opposition

MAYOR Lapham of San Francisco expressed belief recently that intervention by the Office of Price Administration, which blocked the municipal railway's 8½-cent fare from becoming effective January 20th, was inspired by groups opposing the increase.

"This is the last blow from those who fought the raise," said the mayor.

Lapham did not elaborate on his statement, but it was recalled that opposition to the increase at city hall meetings was spearheaded by the Communist party, the CIO, and the Central Labor Council of the AFL.

James H. Turner, city utilities manager, added the information that two weeks previous a representative of a Communist party newspaper had inquired whether the city had notified OPA of its intention to increase fares. Turner reiterated that notice was sent to the Washington offices of OPA on December 18th at the request of local representatives of the Federal agency. In that letter, the city suggested a hearing on January 21st if the OPA wanted to protest.

"We requested a reply at once," said Turner, "but an answer agreeing to the hearing date was not received until last Monday (January 14th). Meanwhile, believing that OPA was not interested, we had established January 20th as the effective date for the higher fares."

Turner declared that the OPA was exhibiting a "peculiar interest" at this late date.

Meanwhile, railway officials decided to postpone distribution of the special "three for a quarter" ticket-tokens which were to have gone on sale in downtown business establishments on January 17th.

The basic 8½-cent fare and the 10-cent charge for "casual" riders were approved December 31st by the board of supervisors in a stormy legislative session. The public utilities commission had asked for the increase to permit the railway to raise $20,000,000 in the next five years for modernization of the system.

The opposition of the OPA to a fare increase was based on the belief that it would

impair the government's cost-of-living program. The agency also claimed that the city is now earning "more than a fair return" on the 7-cent fare.

The utilities commission on January 22nd, in a surprise action, voted to put the debated increased fare into effect at 5 AM on January 23rd. The OPA obtained a Federal court restraining order to prevent the new rates going into effect as scheduled. So again, within a week, the new fares were off.

CIO representatives, in a separate action—a taxpayers' suit—also obtained a restraining order in superior court.

Service on both restraining orders was made within a couple of hours on responsible city officials. The city officials said they would conform, because "there was nothing else to do." But they indicated they would fight the proceedings in both courts.

Service on the Federal court restrainer was made on Utilities Manager Turner. The superior court order obtained by CIO representatives was served on William Scott, superintendent of the municipal railway.

Competitive Bidding Ordered

WINDING up the case it instituted early last year with a declaration that competitive bidding for utility securities no longer is in an experimental stage, the state railroad commission recently entered an order that all utilities subject to its jurisdiction accept written, sealed bids in financing of new and refunding issues of more than $1,000,000.

The action, which brought commission policy in line with that of the Securities and Exchange Commission, was over general objection of utilities entered in hearings and briefs running from June through October last year.

Six exceptions to the rule were made as follows:

(1) Issues of less than $1,000,000; (2) issues the commission may find best handled by direct sale; (3) issues designed for exchanges where no commission is involved; (4) securities to be issued pro rata for existing issues; (5) securities offered in reorganization and adjustment proceedings under court order; and (6) notes or conditional sales contracts payable within five years.

It was ordered that no utility may accept a bid from an individual who obtains a direct fee for sale of securities.

Natural Gas Rates Reduced

THE Pacific Gas and Electric Company was recently ordered by the state railroad commission to reduce natural gas rates about $3,500,000 a year beginning with meter readings on February 28th. The reduction averages about 10-3/10 per cent for general service customers who represent 99 per cent of those on the company's gas lines.

The commission opinion said that "such a reduction will leave the company in an earnings position sufficient to meet its financial requirements and will provide not less than a reasonable return on fair value of its gas properties."

Georgia

City Given Condemning Power

THE city of Columbus was granted authority to condemn public utilities and thereby establish municipally owned power plants in a local bill passed by the state house last month.

On January 21st, a 3-man group was appointed by Senator Mel Turner, of Decatur, chairman of the municipal government committee, to study the bill, sponsored by the Muscogee delegation.

This action was taken after a two-and-a-half hour hearing on the legislation, which was attended by a contingent of representatives of the Georgia Power Company and other interested businessmen of Columbus.

Appearing in support of the measure was a group of Columbus city officials, including Mayor Sterling Albrecht.

Senator Ed Johnson, of Columbus, who is sponsoring the bill in the upper house, said he had received more than 500 telegrams from citizens of Columbus advocating passage of the bill.

The legislation provides that the city of Columbus shall have the power to furnish all public services and "to purchase, hire, construct, own, maintain, and operate or lease public utilities" and to acquire "by condemnation or otherwise . . . property (including franchises) or any part thereof necessary for such public services."

The new state Constitution merely authorizes cities to issue revenue certificates for the purpose of establishing power plants.

Construction to Cost Millions

THE 1946 construction program of the Georgia Power Company calls for the expenditure of more than $10,500,000, according to W. E. Mitchell, president. Of this amount, the company will spend more than $3,000,000 in converting its streetcar lines in Atlanta to trackless trolleys.

Concerning improvements in Atlanta, Mitchell said:

"In the Atlanta area, the expansion is to include about 20 miles of new transmission lines, 113 miles of distribution lines, construc-

tion of 14 new substations, and capacity increase of 13 others. An important project already under way is the construction of an underground cable line between the Boulevard and Grady substations. This will complete a service loop around the city that will improve distribution of electric power to all sections."

Eleven streetcar lines in Atlanta will be changed over into trackless trolleys during 1946, Mitchell said.

Illinois

Gets Right to Reduce Quota

UNDER an order issued by the state commerce commission last month, the Peoples Gas Light & Coke Company is authorized to cut its services to industrial companies if the steel strike results in a shortage of supplies of manufactured gas.

Normally, the shut-down steel plants produced millions of cubic feet of gas daily. The company bought and mixed this production with natural gas piped in from the Southwest. Without it, the commission was informed, there was some doubt whether a full quota of consumers could be supplied if unusually severe weather should come.

Commissioners said they were assured vital industries would continue to be served and that domestic customers would get all the gas needed. It was expected, they said, that the order would be rescinded as soon as the strike ends.

Indiana

Utility Rate Cut Planned

A FAR-REACHING plan to reduce rates on all utility services in the state was instituted on January 23rd by Governor Ralph F. Gates and the state public service commission. The cuts, expected to save individuals and corporations in Indiana $25,000,000 to $30,000,000, will cover all utility firms providing water, electric power, gas, and telephone services.

The action stems from the abolition January 1st of the excess profits tax on corporation revenues and follows a survey made by the state commission to determine how great an increase in those revenues was caused by the dropping of the tax.

The governor met on January 23rd with LeRoy E. Yoder, chairman; Lawrence E. Carlson and Lawrence W. Cannon, commission members; and Sam Busby, commission secretary. Plans were made then for completion of the survey, after which "immediate steps" were to be taken to effect the rate reductions.

A statement issued by the governor and members of the commission said:

"It is felt that this reduction in the tax load of these corporations should be reflected in a corresponding reduction in the rates to users and consumers of public utilities in Indiana. The public service commission plans to complete its survey and then to initiate such action as may be necessary to pass these savings on to the users and consumers of utilities in this state."

Mr. Carlson said steps to be taken included an invitation to the utilities to file a voluntary reduction in rates, which then would be passed on by the commission. If the firms do not take advantage of this invitation, then the commission has the authority to issue an order requiring the corporations to show cause why their rates should not be reduced.

Kentucky

Utility Gets Disputed Area

CIRCUIT Judge W. B. Ardery last month upheld permits granted the Kentucky & West Virginia Power Company to extend its service in territory in 16 eastern Kentucky counties claimed by 5 rural electric coöperatives.

In ruling on the eastern Kentucky power case, Judge Ardery said he believed there is a "fundamental difference" between a coöperative association and a privately owned utility operating for profit, but that Kentucky law authorizes the state public service commission to treat them on the same level in awarding permits.

He pointed out the coöperatives obtained authority from the commission in 1944 to operate in the territory in question, but delayed starting because of war conditions and failed to renew their certificates. He commented he did not know why they did not apply for renewals and explained:

"I have the right to breathe, but unless I exercise that right within a certain period I lose it."

Judge Ardery declared the public service agency was within its rights in suggesting the company and the co-ops work out a compromise, but that the co-ops never carried that to a conclusion.

The projects involved 1,182 miles of lines to serve 7,003 consumers at a cost estimated at $2,000,000 and Commission Chairman T. B. McGregor said at the time the company was better able to supply electricity at a lower cost than the co-ops. The company, which has headquarters in Ashland, recently advised the commission it had built 406 miles of the projects plus an additional 102 miles of short extensions, for which permits are not required, at a total cost of $916,000 and was proceeding with the remainder of the construction.

The co-ops claimed the power company's practice was to serve consumers along the main highways and not extend its lines, at the same level of cost to farm houses on side roads, as the co-ops declared they did.

An appeal was granted.

Bill to Alter TVA Act Offered

A BILL described by its sponsors as being similar in essential respects to the 1944 attempt to amend the TVA Act enabling Kentucky cities to acquire their own electric utility plants was introduced in the state senate by Senator Ray B. Moss, Pineville, Republican floor leader, last month.

"This is not an anti-TVA Bill," Senator Moss said. "The dam (TVA's Kentucky dam at Gilbertsville) is already built, and TVA is here to stay. The only thing this bill does is to try to put private utilities in Kentucky on an equal footing with TVA."

Senator Henry Ward, Paducah, subsequently charged the bill was aimed directly at defeating Paducah's current negotiations to buy local facilities of Kentucky Utilities Company for municipal operation.

"This is the first time in my memory the state legislature has been asked to assist a private company in breaking a contract with the people of a city," Senator Ward said.

He charged further (1) that "Senator Moss introduced Senate Bill 48 for the primary benefit of Kentucky Utilities Company"; (2) that the bill restricts so drastically the constitutional right of cities to own and operate public works "that acquisition of electric properties by cities on a reasonable basis would be impossible, as a practical matter"; (3) that the bill seeks to rig prices to the advantage of private owners "under a formula that would not be indorsed by any fair-minded person—a formula that would have to be followed even in condemnation proceedings brought by a city and prosecuted through the courts"; (4) that the bill, in Ward's opinion, "would make most difficult or impossible extension of REA service to many small towns that ought to be included within REA coöperatives."

Senator Ward stated that "if private utilities can pass a bill such as this in the legislature, they and other selfish interests will be encouraged to take other rights from the people, and gather to themselves protection that will enable them to treat the people as they please."

Tax Suit Dismissed

CIRCUIT Judge W. B. Ardery on January 16th dismissed the city of Louisville's demand for a higher 1943 assessment and the resulting additional taxes from the Louisville Gas & Electric Company than the assessment approved by the state tax commission.

In dismissing the city's attack on the total tax assessment of the Louisville Gas & Electric Company for 1943, Judge Ardery ruled that its transformers and the foundations under its turbine generators are part of its manufacturing machinery which are exempt from local taxation.

Judge Ardery pointed out a similar case of several years ago in which the court of appeals upheld him on this point.

The state tax commission fixed the company's total tax assessment value for 1943 at $52,000,000, including franchise, real estate, machinery, equipment, and other tangible property.

The city contended the total should have been $6,000,000 to $8,000,000 more and tried to get the transformers and foundations made subject to its tax, which for that year was $2.40 per $100 valuation.

Missouri

Governor's Proposal Questioned

PLANS of Governor Donnelly and the state senate banking committee to put the state public service commission in the proposed new department of business and utilities were disrupted last month when members of the commission, under pressure of questioning by Senator Jasper Smith of Springfield, expressed the opinion that the commission would function more effectively as a separate department.

After extended discussion the committee decided to send a group of its members to the governor to ascertain whether he would withdraw his tentative assignment of the commission to the new department, and approve a bill retaining it as a separate government agency.

Chairman Morris E. Osburn of the commission and Commissioners Kyle Williams and Charles L. Henson, all serving under the gov-

ernor, reluctantly took a position in opposition to the assignment as made by the governor, and when pressed by Smith all said they believed that if it were possible the integrity of the commission should not be disturbed.

Under the setup proposed in a bill drafted by Senator Arnold Leonard of Joplin and other members of the committee, the commission would have been included with five other state departments—insurance, building and loan supervision, finance, resources and development, and athletics—with an over-all director with very limited powers.

The bill actually left each of the departments to function exactly as it has, and the director would have been limited to making recommendations on purely administrative matters without any power to put his recommendations into effect. In fact, the only reason for a director was the department must have a head.

Nebraska

FPC Disclaims Jurisdiction

THE Nebraska Power Company is owned by the Loup River Public Power District and not subject to the jurisdiction of the Federal Power Commission, the FPC ruled recently in dismissing protests against the company's $7,000,000 refinancing proposal filed last July. It was a 3-to-2 decision.

The FPC said in its order of dismissal that the Nebraska Power Company ceased to be a privately owned corporation on December 26, 1944, when its common stock was sold to the Omaha Electric Committee, Inc., "which is a quasi public, nonprofit membership corporation, created without capital stock under the laws of Nebraska."

The opinion said further that since that date the Omaha Electric Committee has been and now is an instrumentality of the Loup River Public Power District, a political subdivision of the state of Nebraska.

The order of dismissal was signed by Commissioners Claude L. Draper, Richard Sachse, and Harrington Wimberly. Disapproving the decision were Commissioners Olds and Smith.

New Jersey

Governor Makes Seizure Proposal

A STRONG request by Governor Walter E. Edge of New Jersey for authority to seize public utilities when their operation is threatened by labor-management disputes was reported recently to be awaiting consideration in the state legislature.

Legislation to put the governor's labor program into effect was introduced in the state senate on January 21st shortly before the legislature adjourned until January 28th. Although the program as first outlined in Edge's annual message has been modified by elimination of a plan for compulsory arbitration, Attorney General Walter D. Van Riper said the proposed law still would give Edge power held by no other governor. In addition to the power of seizure, the proposal in its present form provides for a 45-day cooling-off period and for appointment of fact-finding boards with authority to examine books and subpoena witnesses.

As another development in the New Jersey labor situation, United States Senator H. Alexander Smith was on record as supporting the proposed 65-cent minimum wage bill after an unofficial hearing in Trenton in accordance with President Truman's suggestion that the voice of the people back home should be heard.

Higher Gas Rates Asked

THE Public Service Electric & Gas Company has filed an application with the state board of public utility commissioners for permission to raise gas rates for wholesale purchasers and for users of gas for heating and cooling purposes.

The increased rates affect only 5.9 per cent of system gas customers, the application stated, and will increase revenues by $878,000 a year.

The application was based on higher costs and taxes.

The commission has filed the new schedules, a step which was considered to indicate that, unless a public hearing is necessitated by objection to the program, the new rates would become effective in March for wholesale customers, and in June for heating and cooling sales.

Construction Program Announced

PUBLIC SERVICE CORPORATION OF NEW JERSEY on January 24th announced it planned to spend more than $17,000,000 for new equipment, extensions, and replacements for its subsidiary operating companies in 1946. This does not include any part of the $23,000,000 electric generating station which the company plans to build at Sewaren, New Jersey.

New York

Transit Walkout Called off

THE threatened strike on New York city's unified transit lines was called off on January 21st when Councilman Michael J. Quill, international president of the Transport Workers Union of America, acceded to a last-minute suggestion by Mayor O'Dwyer that any proposal for the sale of the city's power plants to the Consolidated Edison Company, a move opposed by the union, be submitted to a public referendum.

Decision to halt the proposed walkout, which would have tied up virtually all the city's transportation facilities, was announced after a meeting of Mayor O'Dwyer and Mr. Quill at city hall and the issuance of a statement by the mayor asserting that municipal ownership of public utilities was "too important a function and policy of this government to be dealt with lightly or in haste."

The mayor's action was regarded generally as a victory for Mr. Quill, as the union leader had demanded originally that the proposed sale of the power plants be voted upon by the electorate.

In his statement, Mayor O'Dwyer declared that the "workers and the union would be well advised to await the recommendation of the board of transportation" in the matter of the sale. He urged that on the question of the union's demand for a pay raise of $2 a day the union resort to collective bargaining with the board of transportation.

Ohio

Power Strike Postponed

SECRETARY Schwellenbach on January 27th announced that a power strike called in southern Ohio for the twenty-ninth had been postponed, and the principals in the wage dispute would meet with him in Washington on that date.

Joseph Fisher, president of the United Utility Workers, CIO, who was in Akron on the twenty-seventh for a district union meeting, agreed to the plan, the Labor Department's announcement said. The companies gave assurance they would be represented.

Almost 8,000 workers are employed by the 3 companies involved: Ohio Edison, Ohio Power & Light, and Dayton Power & Light. They serve a large part of southern Ohio and a section of West Virginia.

Alfred Yale, president of the Akron local of the CIO Utility Workers of America, said it had been "unanimously agreed that strike action will be deferred pending the outcome of a conference being arranged by the Secretary of Labor. It is hoped that at this conference the companies involved will agree to accept, and put into effect, a recommendation for a fact-finding board and avoid a shutdown of electric power set for Wednesday at 12:01 AM."

He said the strike would go on unless the companies agreed to a fact-finding board.

Members of the union have threatened to quit their jobs unless demands for a 20-cent hourly raise are met.

Oklahoma

Ordered to Lower Rates

PUBLIC SERVICE COMPANY OF OKLAHOMA, which serves 222 cities and towns in the state, was directed by a majority of the state corporation commission on January 22nd to file a rate schedule by February 1st which will bring about an estimated annual saving of $650,000 to customers.

Reford Bond, chairman, and Ray O. Weems, vice chairman, announced an investigation of the rate structure of the company, started last November, had been completed and the order resulted.

"The study included forecasts, budgets, statements of past returns, and investment of the company in its electric property," said Bond. "In testing the company's existing structure, we considered forecasts of business, probable delay of industry reconversion to peacetime work, increases in wages, and other costs of doing business. According to our rate analyst, it appears the company has lost more than $1,000,000 a year of war load revenue due to shutdown of industries manufacturing war materials.

"We believe that within a reasonable time it will regain some of that through reconversion of industry to peacetime manufacturing and some through increased sales of domestic and commercial power."

Bond said the rate reductions were to be uniform over the entire system of the company. The schedules were to be filed with the commission by January 25th.

W. J. Armstrong, minority member, who charged several weeks ago that the commission would not make an investigation and ade-

quate reduction if it had funds for the purpose, was not consulted by the commission majority about the order. It was issued by the two members without discussing it with Armstrong.

Rates of the company have been a controversy in Tulsa, the largest city served, and Armstrong supported the move to bring about lower rates. Paul Reed, auditor of the commission, estimated more than $200,000 of the reduction would go to Tulsa.

In preparing the order for reduction, the commission figured earnings for the company at 5½ per cent on a rate base of $46,502,000 to amount to $2,441,000. It ordered the company to write off its books intangibles representing $4,494,152 in excess of system of cost of the electric properties over original cost.

Texas

Single Ownership Rejected

THE Securities and Exchange Commission last month blasted hopes of city officials that Dallas Railway & Terminal Company would continue under common ownership with Dallas Power & Light Company as in past years.

Assistant City Attorney A. J. Thuss was informed that the SEC had rejected the application of Texas Utilities Company to bid for purchase of the tram company. The SEC vote was 3 to 2.

Dallas Railway & Terminal Company was scheduled to be sold to the highest bidder on January 21st by Electric Power & Light Corporation. The sale was under SEC orders to utility companies to divest themselves of unrelated or unintegrated interests.

Several months ago Texas Utilities Company bought 91 per cent of the stock of Dallas Power & Light Company from EP&L.

Texas Utilities, as an electric holding company, was ineligible under SEC rules to bid on the railway company stock. The city of Dallas, however, backed an application by Texas Utilities for SEC permission.

Mayor Woodall Rodgers said the SEC decision was "a slap at local self-government and the people of Dallas."

"I feel a plain case was made that it would be advantageous to Dallas that the application be granted," the mayor said. "I deeply regret they see fit to repudiate the wishes of Dallas people as unanimously expressed by the city council. It is discouraging to see local self-government slipping away to Federal authority."

Virginia

Governor Opposed to Unionization

GOVERNOR William M. Tuck last month asked the state general assembly to declare unionization of public employees, state or local, in violation of the public policy of Virginia, and that it is beyond the authority of any public official to recognize or negotiate with such a union with respect to any matter relating to government employees or their service.

The governor spoke vigorously in recommending a resolution against collective bargaining with unions of public employees, and told the assemblymen that "a labor union field agent or organizer is now attempting to organize some of the employees of the city of Richmond and conduct collective bargaining negotiations with the city employees.

"Such action is clearly contrary to Virginia's established public policy," he said. "To permit organized resistance by public servants to official governmental decisions and actions necessarily results in strikes. These would cause interruptions and, at times, complete paralysis of necessary governmental activities and functions, thus jeopardizing the safety and welfare of the people."

Seeking Uniform Rates

THOUSANDS of customers of the Virginia Electric & Power Company will receive a rate reduction amounting to approximately $1,368,000 a year, beginning April 1st.

The state corporation commission, in announcing the new schedules, said that these would bring to more than $2,193,000 reductions ordered into effect since the merger of the Virginia Public Service Company with Virginia Electric & Power Company on May 26, 1944.

The new rates, ordered after investigations by the state commission which took into consideration repeal of the Federal excess profits tax, represent the third step toward establishing uniformity of rates throughout the company's territory. Reductions ordered in July, 1944, amounting to more than $390,000, and again in April, 1945, amounting to approximately $435,000 a year, were part of the program.

The Latest Utility Rulings

Municipal Acquisition and Operation of Water Utility Approved

THE Pennsylvania commission approved the municipal acquisition of the properties of a water company and operation thereof beyond the corporate limits of the municipality. It believed that the price to be paid was fair and that the acquisition would serve the public interest.

The approximate purchase price was determined by a formula set out in the act of 1874. This formula provided that the price to be paid for utility properties acquired by a municipal corporation should be the net cost of erecting and maintaining the same, with interest thereon at the rate of 10 per cent per annum, deducting from the interest all dividends theretofore declared. This formula had never been construed by the court but had been construed several times by the commission. In this case, the commission undertook to construe that formula again. The commission said that the interpretative difficulties of the formula lay in the phrases "net cost of erecting and maintaining" and "dividends theretofore declared."

The water company contended that it was entitled to the cost of its current assets as an addition to the cost of erecting the waterworks. The commission ruled that since these assets were directly related to and arose from the company's water supply operation, they should, with the exception of cash, be acquired by the municipality with the waterworks, since the purchaser would be in better position than the seller to use such assets or to liquidate them to the best advantage. Current assets were, therefore, considered as a separate component of the price to be paid for the waterworks and also in the computation of the liquidating dividends to be realized by the selling company.

In interpreting the phrase "net cost of erecting and maintaining," the commission said:

> If "maintaining" is to be construed as synonymous with "repairing," then it follows that the *net* cost of maintaining must mean the cost of repairs for which a company has not been reimbursed by consumers in payment for service. In the case at hand, company has fully recouped, through charges for service, the entire cost of all repairs, as evidenced by the fact that it has paid substantial dividends and has a credit balance in its surplus account. Accordingly it would appear that company has incurred no net cost of maintaining (repairing).

The ruling was also laid down that interest paid on borrowed money, state loans, taxes paid, losses on investments unrelated to the furnishing of water service in a borough, and undistributed profits should be considered as dividends declared, for the purpose of determining compensation to be paid.

The commission said in this connection:

> This conclusion is supported by consideration of the situation of water utilities which are wholly owned subsidiaries of holding companies. It is not uncommon for such utilities to have only relatively small amounts of stock outstanding, with relatively large amounts of interest-bearing indebtedness issued to their holding companies for advances received for construction and other purposes. In any such case the return which the holding company receives on its investment in the utility is in small part in the form of dividends and in large part in the form of interest. No one, we think, would seriously contend that in such a case a distinction should be made, for the purposes of the act of 1874, between the two components of the return, resulting in a higher price to be paid by the municipality, particularly since the division between

dividend-receiving and interest-receiving utility investors is largely within utility control.

In determining the net cost of erecting and maintaining the waterworks, the question arose as to whether or not the cost of drilling wells, which at one time were used as sources of supply of water, but which are not now used, should be excluded from the computation of such net cost of erecting and maintaining. The commission agreed with the company, which contended that the cost of drilling the wells was a proper cost of development of its presently used or useful waterworks system and that it should, therefore, be included in the net cost of erecting and maintaining the waterworks. *Re Borough of Bangor (Application Docket No. 60676).*

New Mexico Commission Announces Views On Valuation for Rate Making

REPRODUCTION cost and original cost were considered by the New Mexico commission in arriving at fair value of electric and water utility property. The reproduction cost appraisal presented was, however, called "highly speculative," and the commission gave it such consideration as it could for purposes of comparison. The commission and its staff were satisfied that conclusions as to original cost were substantially accurate, and the commission gave that testimony great weight and consideration.

An amount was included to represent the commission's estimate of the difference in actual value of the property at a recent valuation date and its depreciated original cost. This was said to be evidence of the consideration the commission had given to the claim for reproduction cost as a going concern and other elements of value recognized by the laws of the land.

Reference was made to the fact that the law under which the commission acts provides for a determination of fair value. The commission said:

> Certainly, if the legislature contemplated that the original cost basis should be used, it would have been needless to charge upon the commission the duty of ascertaining the reasonable value of the property; instead, the legislature would have charged the commission with the duty to ascertain the original cost of all the property. This the legislature did not do.

Contributions in aid of construction were deducted from original cost. A proper depreciation reserve was considered as an appropriate deduction. Such a reserve was determined by exclusion of what the commission found to be an overaccrual of depreciation. Disposition of the overaccrual was ordered by debiting Account 250, Reserve for Depreciation of Electric Plant, and crediting a similar amount to Account 271, Earned Surplus.

Annual depreciation accruals had been determined by provisions of an indenture of mortgage which required accrual on the basis of 15 per cent of gross revenue less maintenance. The commission found that this method worked a hardship on consumers as well as the company. It believed that the condition should be remedied by discontinuing the present method and accruing depreciation on a term-life or a straight-line basis.

In considering working capital, the commission approved an allowance for operating expenses and maintenance arrived at by taking one-eighth of the total operating expenses and maintenance charges for the year. An allowance was made for petty cash. A claim for cash to cover Federal taxes was disallowed because such taxes are paid in arrears. A claim for estimated capital expenditures for the year was rejected for the reason that such expenditures are of a routine character, and the company anticipated receiving immediately revenues on such

expenditures from new customers. Allowance was made for materials and supplies to reflect the inventory. Allowance was also made for prepayments.

A claim for going concern value was rejected. This, it was maintained, was closely allied with good will. *Re New Mexico Power Co. (Case No. 75).*

Similar rulings were made in *Re Las Vegas Light & Power Co. (Case No. 71); Re New Mexico Power Co. (Case No. 72); Re Deming Ice & Electric Co. (Case No. 73); Re New Mexico Power Co. (Case No. 74).*

Exemption from Competitive Bidding Upheld Over Objections by City

A FEDERAL court upheld an order of the Securities and Exchange Commission approving the sale by Federal Water & Gas Corporation of its stock holdings in the Peoples Water & Gas Company, although the city of North Miami Beach demanded competitive bidding. The subsidiary distributes gas in Miami Beach and surrounding communities, including North Miami Beach.

Both the holding company and the commission insisted that the effort of the city was to have the court put itself in the position of, and exercise the jurisdiction the statute accorded to, the commission. The court said that a careful consideration of the opinion of the commission in the light of the record left no doubt that the city did not show itself aggrieved in any manner by the proceedings, the findings, or the order of the commission.

The commission had allowed the city to intervene and extended it full opportunity to present evidence and to argue its position. The commission carefully canvassed the city's contentions that competitive bidding was required but concluded, on the contrary, that the public interest and that of investors and consumers alike was better served by exempting the sale from competitive bidding.

The court said:

> The statute authorizing review does not confer on this court any general supervision of the commission or in any manner charge it with administering the act. On the contrary, it provides that the findings of the commission as to the facts if supported by substantial evidence shall be conclusive. The city, in its petition for review, does not point to, nor does it show, any respects in which the evidence fails to sustain the commission's finding that a case for the exception was made out. It takes merely the general position that as a municipality, which with its citizens are consumers, it has some kind of absolute right to insist that the commission refuse to recognize the exceptions to public bidding which its own rules have laid down.

City of North Miami Beach, Fla. v. Federal Water & Gas Corp. et al. 151 F2d 420.

Diversion of Current Justified Cutting Off Service

AN electric utility is entitled to require payment for current according to correct registration without regard to who was responsible for current being detoured around a meter. This ruling was made by the Mississippi Supreme Court in upholding the action of a rural electric association in discontinuing service to a customer-member operating a store, filling station, and chicken farm.

A meter reader, surprised at the small consumption, noted that the meter was not registering, although it was in good condition and lights were burning. He threw the switch and the lights continued to burn. It was discovered that there was a "jumper" around the meter. A check meter was then installed on a pole,

and a dispute subsequently arose over charges, which were based on check-meter readings.

The court reversed a decree granting a mandatory injunction to restore service and made an award for current furnished. The customer was denied relief under a cross-appeal for damages sustained in the loss of chickens and the operation of his business due to heat and light being discontinued. The association, said the court, had reserved the right to discontinue service at any time for nonpayment of arrears. *Capital Electric Power Asso. v. Franks, 23 So2d 922.*

Deferred Maintenance Charges Disallowed And Discount on Bills Ordered

In an investigation to determine whether the Michigan Consolidated Gas Company was charging rates which yielded an extraordinary profit to the utility and whether or not the utility was charging an unnecessary element of expense against the consuming public, the Michigan commission disallowed as an operating expense certain charges which had been made to income and concurrently credited to deferred maintenance reserve during the year 1945. It ordered that no additional accrual to that reserve should be made during the remainder of the year.

An amount of $264,000 to be credited to a deferred maintenance reserve was found by the commission to be a special provision. In this special reserve provision had been made for the testing of 54,000 meters at an estimated expense of $3.60 a meter, which in total amount was the sum of $194,000. Also in the special reserve was an amount of $70,000 for conditioning of mains. The state commission explanation follows:

> It is unquestioned that the company in setting up this reserve is acting in good faith; however, during the years 1942 and 1943 the company has accumulated $347,000 in this reserve which, in the opinion of the commission, is all that need be set aside for the present. We fully appreciate that the actual expenditure for deferred maintenance in the years during which the work may actually be performed may be in an amount sufficient to distort the operating results of the company for these years. If such should occur, we suggest that such expenditure be amortized over a sufficient period of years to avoid the distortion of operating results.
>
> By disallowing the accumulation of an additional $264,000 to the deferred maintenance reserve during 1945, a reduction of approximately $1,500,000 may be made in the gross revenues of the December, 1945, revenue period.

Upon these findings the company was ordered to allow a discount of 53 per cent from the face amount of bills to consumers covering its December, 1945, revenue period. *Re Michigan Consolidated Gas Co. (D-3430).*

Franchise Gives City No Power to Order Rate Reduction

Dismissal of a complaint by the city of Jackson to force a rate reduction upon the Consumers Power Company has been upheld by the Michigan Supreme Court. The court held that neither rights reserved in a franchise nor a home rule charter gave the city power to regulate rates.

The company had operated under a franchise ordinance fixing a maximum gas rate and reserving to the city the right to alter or amend the ordinance and to make further rules, orders, and regulations as might from time to time be deemed necessary. The rate was modified on several occasions by express agreement between the parties. In 1943 the ordinance was amended to reduce

rates about 20 per cent. This ordinance was not accepted by the company.

Prior to 1943 manufactured gas had been supplied. Then natural gas was substituted under authority of the commission, but the commission refrained from making a rate which had been established for other communities applicable to the city of Jackson. It stated that its record showed that rates in Jackson were regulated by franchise. The company thereupon promulgated identical rates as approved by the commission for other cities.

The franchise reservation, it was held, gave the city no authority to fix rates without agreement of the company, although it gave the city the right to make regulations to protect public interest, safety, or welfare. After termination of agreed rates the company had the right to promulgate rates subject to commission control.

The home rule city charter gave the city power to regulate rates, but subject to the limitations of general laws. Since power to regulate rates was vested in the commission under general law, this supplanted any contravening charter provision.

The mere recital in the commission order that its records disclosed that rates in Jackson were regulated by franchise was not *res adjudicata*. That portion of the commission's opinion dealing with this situation did not constitute a part of its determination, findings, or ultimate holding or order. *City of Jackson v. Consumers Power Co. 20 NW2d 265.*

Radio Station May Cancel Broadcasting Contracts

DISMISSAL of a complaint against a radio station for cancellation of a broadcasting contract on the ground that the complaint failed to state a cause of action was affirmed by the circuit court of appeals.

The contract reserved to the defendant station a unilateral option to cancel the contract upon giving a specified notice of intention to terminate. The cancellation provision was held to be supported by the law of Pennsylvania. This action, in the Federal court, was predicated upon diversity of citizenship, and for this reason the court held that the law of Pennsylvania, in which the contract was presumed to have been executed, should apply. It was said that cancellation provisions are not uncommon in radio broadcasting contracts and that their validity is too clear to require extended discussion.

Certain of the allegations attempted to assert a violation of Federal antitrust laws despite the fact that neither the Sherman Act nor the Clayton Act was mentioned in the pleading. The court said:

> This is not in itself of great importance but the allegations of the amended complaint are insufficient to state any cause of action under the antitrust laws. For example, it is not alleged that the defendant is in a dominant position in the broadcasting field or that it is a member of a chain which so monopolizes radio broadcasting as to render it impossible for the plaintiffs to find other outlets for their broadcasts. Neither conspiracy nor concert of action is asserted. As we stated in William Goldman Theatres, Inc. *v.* Loew's Inc., 3 Cir., 150 F2d 738, paraphrasing a statement in United States *v.* Socony-Vacuum Oil Co. 7 Cir., 105 F2d 809, 825, "The purpose of the antitrust laws —an intendment to secure equality of opportunity—is thwarted if group power is utilized to eliminate a competitor who is equipped to compete." The plaintiffs do not allege that the defendant seeks to eliminate a competitor by refusing to sell radio time to the plaintiffs. It is not asserted that the defendant entered into a conspiracy with the plaintiffs' competitors in religious broadcasting to eliminate the plaintiffs from the religious broadcasting field. Indeed, in justice to the plaintiffs it should be stated that they do not assert expressly that they are competitors in a field of religious broadcasting or that religious broadcasting is a commodity. Properly they have avoided such allegations but the plaintiffs have stated no cause of action under the antitrust laws of the United States.

It was contended that since the broad-

casts canceled were religious, the cancellation violated the First Amendment of the Federal Constitution protecting freedom of speech and of religion. This contention was not upheld. The court said that the amendment was intended to operate as a limitation to the actions of Congress and of the Federal government. A radio station was held not to be an instrumentality of the Federal government, but a privately owned corporation. Finally, on this particular point the court stated that it knew of no Federal statute giving a cause of action against a private person who had abridged another's right of freedom of speech or religion.

While it was conceded that such cancellation might constitute censorship, it was decided that no law prohibits a radio station from refusing to sell time in which an individual may broadcast his views. A radio station, it was held, is not a public utility in the sense that it must permit broadcasts by whoever comes to its microphones. *McIntire et al. v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F2d 597.*

Other Important Rulings

THE New York commission authorized a natural gas company to charge the cost of acquiring, at a tax foreclosure sale, land in fee on which it already owned oil and gas rights and gas wells to the account, Other Physical Property, rather than to Operating Property Account, where the acquisition was necessary to protect its oil, gas, and well rights. *Re Producers Gas Co. (Case No. 9836).*

The United States Court of Appeals for the District of Columbia held that the United States, as a customer of an electric company, may appeal from a commission order determining rates. *United States v. Public Utilities Commission of District of Columbia et al. 151 F2d 609.*

The Colorado commission holds that it may not authorize competing motor carrier service if the existing service is adequate or, if inadequate, it can be made adequate under the direction of the commission. *Re Dunlap (Application No. 2985-AB-B, Decision No. 25132).*

A Texas court held that where an interstate carrier had rate schedules on file for transportation of household goods and the rates varied according to the value placed upon the goods, it was not necessary that a shipper be told that he had a choice of rates, since the presumption was that he knew the provisions of the schedules. *Gulf, Colorado & Santa Fe Railway Co. v. McCandless, 190 SW2d 185.*

The Wisconsin commission, in view of the number and magnitude of the economic uncertainties which must be faced as the country emerges from the war period, was reluctant to establish permanently a level of rates which, on the basis of present abnormal operations, would yield a fair return, but it believed that an order prescribing a temporary reduction, with jurisdiction retained so that prompt action might be taken any time, was best suited to meet the situation, where existing rates were deemed to be excessive. *Two Rivers v. Commonwealth Teleph. Co. (2-U-2009).*

Combined common and private motor carrier operation was held by the Washington department to be inconsistent with public interest, since the mixed operation offered only a part-time service. *Re H. D. May (Order No. M. V. No. 43650, Hearing No. 3504).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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Public Utilities Reports

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VOLUME 61 PUR(NS) NUMBER 4

Points of Special Interest

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Titles and Index

TITLES

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SECURITIES AND EXCHANGE COMMISSION

Re Charges in Lieu of Taxes

Holding Company Act Release No. 6200; Accounting Series Release No. 53
November 16, 1945

STATEMENT of Commission's opinion regarding "charges in lieu of income taxes" and "provisions for income taxes" in the profit and loss statement, issued under the Securities Act, Securities Exchange Act, Holding Company Act, and Accounting Series.

Accounting, § 57 — Financial statements — Charges in lieu of taxes.

1. The amount shown on an income statement as provision for taxes should reflect only actual taxes believed to be payable under the applicable tax laws, p. 194.

Accounting, § 21 — Amortization of deferred items.

2. It may be appropriate, and under some circumstances such as a cash refunding operation it is ordinarily necessary, to accelerate the amortization of deferred items (such as unamortized bond discount and expense) by charges against income when such items have been treated as deductions for tax purposes, p. 194.

Accounting, § 57 — Financial statement — Charges in lieu of taxes.

3. The use of the caption "charges or provisions in lieu of taxes" in making a financial statement is not acceptable, p. 194.

Accounting, § 57 — Financial statement — Charges for write-off.

4. If it is determined, in view of the tax effect now attributable to certain transactions, to accelerate the amortization of deferred charges or to write off losses by means of charges to the income account, the charge made should be so captioned as to indicate clearly the expenses or losses being written off, p. 194.

Accounting, § 57 — Income statement — Location of special charge — Amortization.

5. The location within the income statement of any special charge, such as acceleration of amortization of deferred charges or writing off of losses, should depend on the nature of the item being written off; and in the case of a public utility a special amortization of bond discount and expense should not be shown as an operating expense but should be classified as a special item along with other interest and debt service charges in the "other deductions" section, p. 194.

Accounting, § 57 — Financial statement — Special charges.

6. It is appropriate to call attention in an income statement to the existence of a special charge, such as a charge for amortization of deferred charges or writing off of losses, by the use of appropriate explanatory language in connection with intermediate balances and totals, p. 194.

Accounting, § 57 — Financial statement — Estimates of future earnings — Income taxes.

7. In the preparation of statements reflecting estimates of future earnings it is ordinarily permissible to reflect as income taxes the amount which it is expected will be payable if such earnings are realized, provided the assumptions as to the tax rates are disclosed, p. 194.

Accounting, § 57 — Financial statement — Provision for taxes.

8. In the preparation of statements which are designed to "give effect" to specified transactions the provision for taxes may, depending on all the facts and circumstances, properly represent either (a) the actual taxes paid during the period adjusted to give effect to the specified transactions, or (b) an estimate of the taxes that it is expected will be payable should the income of future years be equal in amount to the adjusted income shown in the statement; and the statement should clearly show what the provision for taxes purports to represent, p. 194.

Accounting, § 38 — Income taxes.

Discussion, by Securities and Exchange Commission, of form of income statement showing income taxes as an element of operating expenses, or, as is sometimes said, "above the line," the items included "above the line" being generally recognized as expenses allowable in computing gross income for rate purposes, whereas deductions made "below the line," such as interest and items carried to surplus, are not chargeable in this way, p. 215.

Expenses, § 114 — Income taxes.

Discussion, by Securities and Exchange Commission, of the deductibility of income taxes in computing return for rate purposes and the relation of this question to income statements and accounting, p. 215.

Expenses, § 54 — Financing cost — Interest.

Discussion, by Securities and Exchange Commission, of the general rule that costs and expenses, including interest, that arise from the borrowing of capital are to be excluded from the computation of gross income for rate-making purposes, p. 217.

By the COMMISSION:

[1–8] The purpose of this statement is to outline the Commission's views in the matters of so-called "Charges in lieu of income taxes" and of "Provisions for income taxes" which are intentionally in excess of those actually expected to be payable; to give the reasons for that opinion; and to state its views on the points which certain accounting firms have made in connection with the principles discussed herein.

For some time there has been growing up a practice, tolerated by some accountants and sincerely advocated by others, pursuant to which the current income account is charged under the heading of income taxes or charges in lieu of income taxes, not only with the income taxes expected to be paid by the company but also with an additional sum equivalent to the reduction in taxes brought about by unusual circumstances in a particular year.[1] Certain public utility companies have in-

[1] In general, the unusual circumstances are based on differences in the accounting treatment of certain items for income tax purposes and for general financial purposes. For example, losses and expenses which had to be taken as income tax deductions in a given pe-

cluded such charges and excessive income tax provisions among their Operating Expenses. This additional charge against income is, in most cases, offset either by a credit to surplus or by utilizing the reduction for some special purpose such as eliminating a portion of unamortized discount on bonds. The amount of the estimated reduction has been colloquially termed a "tax saving" and the general problem is loosely referred to as the "treatment of tax savings." [2]

This practice with its variants has caused the Commission some concern and it seems desirable now to state our views as to the accounting procedures appropriate in such situations and to give the reasons for them. In summary, our conclusions are as follows:

1. The amount shown as provision for taxes should reflect only actual taxes believed to be payable under the applicable tax laws.

2. It may be appropriate, and under some circumstances such as a cash refunding operation it is ordinarily necessary, to accelerate the amortization of deferred items by charges against income when such items have been treated as deductions for tax purposes.[3]

3. The use of the caption "Charges or provisions in lieu of taxes" is not acceptable.

4. If it is determined, in view of the tax effect now attributable to certain transactions, to accelerate the amortization of deferred charges or to write off losses by means of charges to the income account, the charge made should be so captioned as to indicate clearly the expenses or losses being written off.

5. The location within the income statement of any such special charge should depend on the nature of the item being written off. In the case of a public utility, for example, a special amortization of bond discount and expense should not be shown as an operating expense but should be classified as a special item along with other interest and debt service charges in the "other deductions" section.

6. It is appropriate to call attention to the existence of the special charge by the use of appropriate explanatory language in connection with intermediate balances and totals.

7. In the preparation of statements reflecting estimates of future earnings, it is ordinarily permissible to reflect as income taxes the amount which it is expected will be payable if such earnings are realized provided, of

riod were not also taken as deductions in the profit and loss statement for the same period. Instead, because of differences in accounting methods, such items had already been charged off against income in previous years, or were being charged off directly to surplus or reserves, or were to be deferred and charged off against income in future years.

[2] We think this terminology is undesirable in principle and possibly misleading. Our preference is to call them "tax reductions." See note 23 *infra*.

[3] Under the controlling decisions of the Federal courts (Helvering v. California Oregon Power Co. [1935] 75 F2d 644; Helvering v. Union Pub. Service Co. [1935] 75 F2d 723) unamortized bond discount and expense applicable to bonds being refunded through the issuance of new bonds for cash are deductible for purposes of the Federal income tax in the year in which the refunding takes place. Not all accountants, however, are in accord that such items must as a matter of sound accounting be immediately written off. Many believe that such items should preferably be amortized against income over the life of the refunding issue if a correct statement of the cost of money is to be obtained. (Cf. Healy, Treatment of Debt, Discount and Premium Upon Refunding, 73 Journal of Accountancy, 199 (March 1942)).

course, the assumptions as to the tax rates are disclosed.

8. In the preparation of statements which are designed to "give effect" to specified transactions, the provision for taxes may, depending on all the facts and circumstances, properly represent either (a) the actual taxes paid during the period adjusted to give effect to the specified transactions, or, (b) an estimate of the taxes that it is expected will be payable should the income of future years be equal in amount to the adjusted income shown in the statement. The statement should, of course, clearly show what the provision for taxes purports to represent.

The reasons for our views can best be developed by using the facts relating to a registration statement recently filed by the Virginia Electric and Power Company (VEPCO) under the Securities Act of 1933 in which we took a position in the matter. This case is chosen not only because its facts are typical of most cases in which this problem arises but also because the public accountants who certified the financial statements in that case have since appeared before us and presented in detail their views in the matter.[4] The discussion of this case and of the general problem which it typifies will be presented under the following main headings:

I. *The background of the Vepco Case*—A brief description of the registration and of the transactions giving rise to the problem.

II. *The Certified Financial Statements Originally Filed*—A description of the certified financial statements originally filed, pointing out briefly our difficulties with the way in which the so-called "tax saving" was handled.

III. *Amendments to the Certified Statements*—A description of the certified income statements after each of the amendments, pointing out briefly in each case our objections to the treatment accorded tax provisions and "tax savings."

IV. *The Pro-forma Income Statements*—A brief description of the proforma statements filed, pointing out our objections to the treatment of taxes in the statements originally filed.

V. *The Findings and Opinion of the Commission in the Related Case*—Re Virginia Electric & Power Co. (Holding Company Act Release 5741) April 20, 1945—A description of the financial statements and ratios set forth in that opinion which were criticized in some respects by the certify-

[4] In the summer of 1944, we caused to be circulated for comment a proposed Accounting Series release containing a tentative statement of our conclusions in this matter. Comments were received from accountants, registrants, and others interested in the problem and a number of informal conferences were arranged with the staff and the Commission. Of the twenty-eight letters and comments received, five individuals or firms and a committee of the American Institute of Accountants objected to the general position taken in the draft. Subsequently, in December, 1944, the Committee on Accounting Procedure of the American Institute of Accountants issued a bulletin "Accounting for Income Taxes" which in a number of important respects is inconsistent with the conclusions we have reached. In January, 1945, the Committee on Accounting Principles and Practice of the New Jersey Society of Certified Public Accountants issued a statement with respect to the A.I.A. bulletin, taking some exception to the proposals made as to the treatment of "tax savings." In coming to a final conclusion in this matter, we have given extensive consideration to the views expressed and the points made by those commenting on the tentative statement of our views, as well as to the contrary position taken in the bulletin mentioned.

ing accountants in their discussion of this problem.

VI. *The treatment of "Tax Savings" in Financial Statements Filed with This Commission*—A detailed discussion of the considerations underlying our views as to the treatment of income taxes and of so-called "tax savings."

I

The Background of the Vepco Case

On March 23, 1945 the Virginia Electric and Power Company (VEPCO) filed with this Commission under the Securities Act of 1933 a registration statement covering its first and refunding mortgage bonds, series E. The statement after being amended several times became effective on April 20, 1945, as to $59,000,000 of such bonds. Certain financial statements of VEPCO included in the registration statement were certified by Lybrand, Ross Brothers & Montgomery. Those of Virginia Public Service Company, a company recently merged with VEPCO, were certified by Arthur Andersen & Co. Several days after the amended statement became effective, representatives of both firms of certifying accountants appeared before the Commission to discuss certain accounting questions as to the treatment of income taxes and of the so-called "tax savings."

In the registration statement filed by VEPCO, certified financial statements for the years 1942, 1943, and 1944 were filed for VEPCO, for Virginia Public Service Company which had been merged with VEPCO on May 26, 1944, and for the two companies combined. In addition, there were filed "adjusted" balance sheets and income statements designed to give effect to the merger with Virginia Public Service Company, the sale of certain transportation properties, the proposed refinancing and certain related adjustments.

The accounting and "tax savings" issues centered on the treatment to be accorded the following three items which arose out of transactions that had occurred in 1944:

1. Premiums and expenses incurred in refunding VEPCO's bonds, amounting to $2,383,096.46.[5]

2. A loss of $3,418,715.16 sustained upon the sale by VEPCO of certain transportation properties.

3. An item of $600,949 said to arise out of the asserted fact that the normal depreciation on certain plant facilities was substantially less than the amortization of such facilities taken for tax purposes at 20 per cent per annum under § 124 of the Internal Revenue Code.[6]

[5] In 1942 Virginia Public Service Company called for redemption certain of its outstanding bonds, Unamortized debt discount and expense, call premium and expenses applicable to the redeemed bonds amounted to $2,021,708.13. Solely in order to simplify the present discussion, this item is not discussed in detail although its treatment involved much the same problems as the 1944 refunding.

[6] Section 124 of the Internal Revenue Code, 26 USCA § 124, provides for the deduction by taxpayers, at their election, of accelerated amortization of property (including land) constituting an "emergency facility" by reason of certification by designated government authorities that the property was necessary in the interest of national defense. Such amortization, which is in lieu of a deduction for ordinary depreciation usually at a much lower annual rate, is based on an arbitrary 5-year life period but this may be amended to such shorter period as will end with the date officially declared as the end of the emergency war period. The President, by Proclamation, terminated the emergency period referred to in § 124 as of September 29, 1945. The

In the original registration statement, and in all of the amendments, the registrant and its accountants took the position that the income statements should be prepared in such a way as to reflect therein charges equal to what it was estimated Federal excess profits taxes would have been had not the special transactions occurred. In the original filing the provision for excess profits taxes was shown as an operating expense not in the amount expected to be paid but in the amount that would have been payable had not the three special items existed. After the second amendment, the provision for excess profits taxes was shown at what was actually estimated to be payable for the current year under the applicable tax law, but a separate additional charge, specially described, was also included among the operating expenses in an amount equal to the difference between the provision for actual taxes and the estimated provision that would have been needed had not the three items existed. The third and fourth amendments altered the description of these special charges, and their position in the income account. The wording of some of the other related captions was also modified. As finally amended, special charges representing portions of the premium and expenses on redemption of the bonds and of loss on sale of properties were wholly excluded from the operating expenses and set out as a separate item of "deductions from income." The adjustment within the income account based on the treatment of emergency facilities was eliminated. The extent to which this presentation reflects the views expressed in this opinion will be pointed out later.

In Exhibits A, B, C, and D there are presented the relevant portions of the 1944 income statement as originally filed and after each amendment.

II

The Certified Financial Statements Originally Filed

The Commission's directly applicable accounting requirements are found in Rules 3-01(a), 3-06, 5-03, and 11-02 of Regulation S-X. The pertinent portions of the rules are reprinted in the margin:[7]

VEPCO statements do not indicate the dollar amounts of such facilities, the normal depreciation taken, or the amortization taken for tax purposes. The figure of $609,949 represents the company's estimate of the amount by which Federal taxes would have been increased had only the *normal* depreciation been taken for tax purposes.

[7] a. Rule 5-03 (Profit and Loss or Income Statements) Caption 15—"*Provision for income and excess profits taxes.*—State separately (a) Federal normal income and excess profits taxes; (b) other Federal income taxes; and (c) other income taxes."

b. Rule 5-03, Caption 12—"*Miscellaneous income deductions.*—State separately, with explanations, any significant amounts, designating clearly the nature of the transactions out of which the items arose."

c. Rule 11-02 (Statement of Surplus) Captions 3 and 4—"3. *Other additions to surplus.*—Specify. If two or more of the classes of surplus specified in the rule as to the form and content of the particular balance sheet are stated in one amount, the nature of other additions to surplus (caption 3) and of other deductions from surplus (caption 4) shall nevertheless be so designated as to indicate clearly their classification in accordance with such applicable rule. 4. *Deductions from surplus other than dividends.*—Specify. See Caption 3."

d. The second sentence of Caption 3 of Rule 5-03: "A public utility company using a uniform system of accounts or a form for annual report prescribed by Federal or state authorities, or a similar system or report, may follow the general segregation of operating expenses prescribed by such system or report."

e. Rule 3-01 (a)—"Financial statements may be filed in such form and order, and may

It is apparent that these rules called for the careful segregation and clear description of any nonrecurring or unusual items charged or credited to the income account or to earned surplus. The plain import of caption 15 of Rule 5-03 is that there shall be shown thereunder only amounts actually provided for income taxes.

With those requirements in mind we turn to the income statement originally filed by the registrant, and certified by its accountants, purportedly in conformity to the requirements of the Securities Act and the rules and regulations issued thereunder.

As will be seen from Exhibit A, there was set forth in the 1944 income statement, as an operating expense, an amount for excess profits taxes equal to what the registrant computed would have been the amount of such taxes had none of the three special items existed. This excess profits tax figure appeared under the caption, "Taxes, excluding reductions shown separately below or applied against items charged directly to surplus."

The reduction in taxes attributed by the registrant to the excess of the tax amortization of emergency facilities over the normal depreciation thereon was added back to net income at the very bottom of the statement under this caption:

"Reduction in Federal income and excess profits taxes resulting from the amortization of factilities allowable as emergency facilities under the Internal Revenue Code, which facilities are expected to be employed through their normal life and not to replace existing facilities ..... $609,949."

The sum of this item and of a figure labeled "Net Income" was described as "Balance transferred to earned surplus . . . "

In the related surplus statements, charges were set forth in respect of the refunding costs and the loss on sale of transportation properties as follows:

"Loss arising in connection with sale in 1944 of transportation property, less resulting reduction in Federal taxes on income $1,361,842.16."

"Redemption premiums and expenses in connection with refunding of bonds, less resulting reduction in Federal taxes on income ..... $291,919.46"

There were no notes to the certified income or surplus statements in further explanation of these items.[8]

The 1944 income statement as

use such generally accepted terminology, as will best indicate their significance and character in the light of the provisions applicable thereto."

f. Rule 3-06—"The information required with respect to any statement shall be furnished as a minimum requirement to which shall be added such further material information as is necessary to make the required statements, in the light of the circumstances under which they are made, not misleading. This rule shall be applicable to all statements required to be filed, including copies of statements required to be filed in the first instance with other governmental agencies."

[8] In the 1942 income statements of Virginia Public Service Company a similar transaction was explained by means of a footnote which if read in conjunction with the surplus statement disclosed the total refunding expenses. The note read as follows:

"(C) Federal Income and Excess Profits Taxes:

"Virginia Public Service Company and subsidiaries—The statements of income for the year 1942 include provision for Federal normal income and excess profits taxes computed on the basis of taxable net income after deducting amortized debt discount and expense, call premium, and duplicate interest on long-term debt called for redemption in 1942. The reduction resulting from the availability of these nonrecurring deductions in computing the amount of 1942 taxes payable amounts to $1,571,158 and an equal amount has been deducted in the accompanying statements of income for 1942 as special amortization of debt discount and expense. The balance of unamortized debt discount and expense, call premium and duplicate interest on long-term debt called for redemption in 1942 was charged against earned surplus.

"However, the taxable net income as com-

originally filed by the registrant and certified by its public accountants, did not comply with the applicable requirements and in our opinion was clearly misleading in the following important respects:

1. The total loss on sale of transportation properties was not shown.

2. The amount of refunding expenses in 1944 could not be determined.

3. The amount provided for the estimated tax liability for 1944 could not be determined.

4. The treatment and disclosure of similar transactions was different. In 1942 the amount of the estimated reduction in taxes due to the refunding was stated; this was not done as to the 1944 refunding. Also the treatment accorded tax deductible losses charged to surplus was different in 1942 than in 1944.

An investor could thus determine from the certified financial statements only that the *sum* of the tax liability *plus* loss on transportation properties *plus* the refunding expenses amounted to a certain figure as follows:

Provision for taxes (as shown in the income statement)	
Federal Income Tax	$2,139,496.39
Federal Excess Profits	8,164,870.79
Postwar Credit	(351,081.99)
Total tax provision ..	$9,953,285.19
Surplus charges, less resulting reduction in Federal taxes on income	
Loss on transportation properties	1,361,842.16
Refunding expenses	291,919.46
	$11,607,046.81
Less:	
Reduction due to amortization of emergency facilities (as shown in the income statement)	609,949.00
Balance	$10,997,097.81

It is true that by reference to the uncertified pro forma or adjusted income statements it can be determined that the reduction in taxes due to the items charged to surplus was $4,148,050. It is obviously unsound, however, to expect that a collateral disclosure in one set of statements will be inevitably and clearly connected by the reader with the information given in another and certified set of statements, at least without a clear cut cross reference.[9] This was apparently recognized since in the first amendment a paragraph was added to Note C to the income statement disclosing the $4,148,050 figure.[10] However, even

puted did not reflect the deduction, for tax purposes, of losses upon sales of ice and railway property, and certain other items charged to surplus. As a result, provisions charged to income in 1942 were approximately $330,000 in excess of the company's liability for Federal income taxes as shown in its tax return for that year. Pending review of the returns, this excess provision is included in accrued Federal income and excess profits taxes at December 31, 1943.

"In 1943 the company filed a claim for refund of 1941 Federal taxes in the net amount of approximately $297,000 under the carryback provisions of the 1942 Revenue Act. However, this amount is subject to such adjustments as may result from review by the U. S. Treasury Department and the claim has not been recorded upon the books of the company." (See also Exhibit A.)

The total refunding expenses can be computed by adding the disclosed reduction of $1,571,158 to the $450,549.98 which is shown as a net direct debit to earned surplus.

[9] As we said in our opinion in Re Universal Camera Corp. (Securities Act Release 3076, June 29, 1945): "A disclosure which makes the facts available in such form that their significance is apparent only upon searching analysis by experts does not meet the standards imposed by the Securities Act of 1933 as we understand that act."

[10] The first amendment was filed before the staff issued its letter of deficiencies.

with this figure before him the reader could determine only the aggregate reduction attributed to two wholly disparate items. It seems self-evident that the actual total loss on transportation properties sold and the total amount of refunding expenses are material facts. We think it equally apparent that the estimated amount of actual taxes is an important fact.[11]

There is another, though less patent difficulty. The amount shown for excess profits taxes was $8,164,870.79. The postwar credit against excess profits taxes was shown as $351,-081.99, or at the rate of about 4.3 per cent. Since the postwar credit is normally 10 per cent of the excess profits tax, the disparate relationship of these two figures should raise a question to even the average reader of the statement. There was, however, no explanation directed to this point. When the figure shown for excess profits taxes was reduced to the actual amount believed to be payable ($3,406,871.79) no change was made in the amount shown for the postwar credit. Apparently the amount by which the excess profits tax provision was increased on account of the charges to surplus was net of the statutory 10 per cent credit. In other words, the figure shown as a provision for excess profits taxes was doubly a hybrid. First it combined actual taxes with "tax savings." Second to the extent of the estimated actual liability it was computed at the rate of 95 per cent, but as to amounts in excess of actual liability, the rate used appears to have been 85.5 per cent—that is, the full 95 per cent less the 10 per cent postwar credit.

There remains a final point—the caption under which the tax provision was set forth. The language "Taxes—excluding reductions shown separately below or applied against items charged directly to surplus" in our opinion scarcely lends itself to ready understanding but instead is apt very easily to convey exactly the opposite of its intended meaning through its use of "exclude me in" language. In our opinion such a description of this hybrid item represents a distinct barrier rather than an aid to understanding.[12]

In addition to all of the above difficulties, two much more basic questions are presented by the registrant's accounts: (1) whether there may or should be included in the operating expenses of a regulated public utility, under the caption of taxes, any amount in excess of the amount estimated to be actually payable under the applicable provisions of the tax laws; and (2) whether any amount should be

[11] The treatment in this case is particularly unsatisfactory since the aggregate "reduction" is not divided proportionately between the two items. From the amended statements, it appears that the *total* loss on transportation properties was $3,418,715.16 of which $1,361,-842.16 or about *40%* appeared as a charge to surplus. In the case of the refunding expenses the total amount was $2,383,096.46 of which, however, only $291,919.46 or about *12%* was charged to surplus. Inquiry developed that these differences were due first to the fact that in computing the estimated actual tax for the year, the amount recognized as an allowable tax deduction was about $1,-000,000 less than the $3,418,715 recorded as a loss on the books; and, second, to the fact that the refunding expenses used as a tax deduction amounted to about $63,000 more than those written off in the accounts. The amount of the reduction in taxes due to each of these two items was computed by applying a rate of 85.5%, that is, the 95% excess profits tax rate less the 10% postwar credit. Without knowledge of these important facts, even an expert could do no more than guess at what had been done with the accounts.

[12] See note 9, *supra*.

included in or with such operating expenses to compensate for the reduction in taxes due to items like those in question here. These issues are raised more clearly by the statements in their amended form and discussion of them will be deferred until the amendments have been described.

III

Amendments to the Certified Financial Statements

In view of objections on the part of the Commission's staff to the income statements as originally filed, a formal letter of deficiencies was sent on April 14, 1945, specifically criticizing the presentation of the items under discussion as follows:

"Financial Statements

"Income Statements

"It is noted that the earned surplus statement for the year 1942 reflects charges aggregating $497,288.10 representing 'Unamortized debt discount and expense, call premiums and duplicate interest on long-term debt called for redemption, less resulting reduction in Federal taxes on income.' It is also noted that the earned surplus statement for the year 1944 reflects charges of $1,361,842.16 and $291,919.46 representing 'Loss arising in connection with sale in 1944 of transportation property' and 'Redemption premium and expenses in connection with refunding of bonds' respectively, less, in each instance, 'resulting reduction in Federal taxes on income.' Further, it is noted that the 1944 income statements reflects 'tax savings' aggregating $609,949 resulting from special amortization of emergency facilities.

"It appears that the total effective charges to savings in Federal income and excess profits taxes resulting from the above redemption of bonds, sale of property and special amortization of emergency facilities should be reflected separately in the income account under an appropriate descriptive title. In this connection, the title 'charge in lieu of taxes' will not meet such requirement. Such amounts should be shown immediately below the total of 'Operating Expenses and Taxes.' " [13]

Following the filing of the first amendment on April 2nd, there occurred several discussions with the staff based generally on the position taken in the letter of deficiencies dated April 14th. In these discussions it was made clear that the staff took the position that the tax provision should not exceed the estimated amount believed to be payable and that charges to the income account "in lieu of taxes" could not be considered operating expenses. The staff also took the position that it would not object to charging the income account with so much of the two items charged to surplus (loss on sale of transportation properties and refunding expenses) as was equal to the company's estimate of the reduction in taxes caused by such items.

[13] We do not construe this paragraph to mean that charges may be made to income for the so-called "tax savings," provided only they are separately set forth. If it does, we disagree. We construe the language to mean rather that where taxes are reduced due to special circumstances special charges of an equivalent amount may be made to the income account, if the particular item involved is one that may properly be made to income and if the special charge is clearly described for what it is, for example, "Special charge-off of unamortized bond discount."

The second amendment was filed on April 16, 1945, substantially revising the certified income statement for 1944. In the amended statement, the provision for excess profits taxes was shown at the amount estimated to be actually payable. The following new item, equal to the reduction in the amount shown as excess profits taxes, was inserted under the general heading "Operating Expenses and Taxes."

"Special charges equivalent to reduction in Federal excess profits taxes resulting from special amortization of emergency facilities (reduction shown separately below) and from redemption of bonds and sale of property (reductions applied against related items charges to surplus) $4,757,999."

The item was inserted immediately after a total captioned "Total Operating expenses and taxes before special charges." The sum of the special charges and the above caption was labelled: "Total operating expenses and taxes including special charges" and this item was then deducted from the total of operating revenues to arrive at a figure labelled: "Net operating revenues." The remainder of the income statement, and the surplus accounts were the same as in the original filing except that a paragraph added by amendment #1 to Note C to the income statement was dropped, presumably because the $4,148,050 figure it disclosed could now be derived from data given in the income statement.[14] It will be recalled that this figure was the total amount by which taxes were estimated to have been reduced because of the loss on transportation properties and the refunding expenses.

The changes made are summarized in the following table:

	As originally filed	After 2d Amendment
Operating Revenues	$51,681,778	$51,681,778
Operating Expenses and Taxes:		
Other than Taxes	28,237,367	28,237,367
Taxes, excluding reductions shown separately below or applied against items charged directly to surplus[15]		
Taxes:		
Federal income	2,139,496	2,139,496
Federal excess profits	8,164,872	3,406,871
Post-war credit	(351,082)	(351,082)
Other	4,131,408	4,131,408
Total	42,322,060	.....
Total operating expenses and taxes before special charges	.....	37,564,061
Special charges, etc.	.....	4,757,999
Total operating expenses and taxes, including special charges	.....	42,322,060
Net Operating Revenues	$9,359,718	$9,359,718

[14] See Exhibit B. The $4,148,050 figure can be derived as follows:

Special charges	$4,757,999
Reduction due to amortization of emergency facilities (shown as last item of income statement)	609,949
Remainder applicable to the two surplus items	$4,148,050

[15] This caption was deleted by the second amendment and the caption "Taxes" substituted therefor.

The amended presentation was further questioned by the staff on these points:

1. The continued failure to disclose either the total loss on sale of transportation properties or the total refunding expense.

2. The impropriety of adding the special charges to operating expenses.

3. The propriety of the adjustment within the income account in respect of the amortization of emergency facilities.

The second of these points to some extent may conflict with the last sentence of the deficiency letter, quoted earlier, which read:

"Such amounts (i. e., special charges) should be shown immediately below the total of 'Operating Expenses and Taxes.'"

Physically, of course, registrant's amended statement conforms to the deficiency letter by placing the special charges immediately after the total mentioned. It was the staff's position, however, that the deficiency called for their inclusion at that point as a separate, distinct and different item, rather than in such a way as to imply that the special charges were true operating expenses, though perhaps nonrecurring in nature. We feel that the language of the deficiency letter might well have been more explicit and so more in conformity with the oral statements made by staff members. In any event, however, the point is now moot since when the case was presented to us for directions, it was determined not to permit inclusion of such charges in or with operating expenses.

After some further discussion of the matter with the registrant and its accountants, the staff brought the case to the Commission for directions, presenting for consideration the history of the case and the views of the registrant and its accountants both in this and other similar cases. We thereupon directed the staff to advise the registrant to the following effect:

1. That no adjustment should be made within the income statement based on the estimated reduction of income taxes due to the amortization of emergency facilities.[16]

2. That no objection would be raised to the inclusion in the income statement of an item of $4,148,050 representing so much of the refunding expenses [17] and of the loss on disposition of property as was equal to the estimated reduction in income taxes attributable thereto, the remainder of both these items being charged directly to surplus; provided, however, (a) that the caption for the item indicate clearly the nature and amount of the item being charged off and (b) that the special charge be excluded from operating expenses and shown as a deduction from gross income.

After being advised as to our views, the registrant on April 19, 1945, filed a third amendment. In the revised income statement, the $609,949 adjustment based on the amortization of emergency facilities was omitted and taxes were shown at the actual estimated amount thereof. The $4,148,050 of special charges was set

[16] Our views as to this particular variant of the general problem are outlined in note 35, *infra*.

[17] According to the registration statement these costs consisted of redemption premiums and expenses in connection with the refunding of the bonds.

forth as a separate item in the following manner:

Gross income (before special charges below)	$14,072,358.24
Special charges equivalent to reduction in Federal excess profits taxes resulting from redemption of bonds ($2,091,177) and sale of property ($2,056,873) (reductions applied against related items charged to surplus)	4,148,050.00
Gross income (after special charges)	$9,924,308.24
Deductions from income	3,719,526.80
Net income	$6,204,781.44

The qualification "before special charges below" was also added to two prior captions so that they read as follows:

"Total operating expense and taxes (before special charges below)."

"Net operating revenues (before special charges below)."

In addition Note C to the tax item was amended to disclose that no adjustment had been made in the income statement on account of the difference between depreciation taken therein on emergency facilities and the amount claimed therefor as amortization under § 124 of the Revenue Code. The amount by which taxes were affected through this difference was given.

The staff brought the revised statements to our attention and we indicated that in our view the special charges should be classified as "other deductions" inasmuch as they represented items which, if charged to income, should, under the classifications of accounts to which the registrant was subject, be charged as an item of other deductions.

Upon being advised of these views the registrant filed its fourth amendment on April 20th in which the special charges were classified as an item of other deductions and Note C was expanded somewhat to set forth specifically the amounts charged to income in respect of the refunding expenses and the loss on transportation properties. As revised, the note no longer stated the amount of the tax reduction attributed by the registrant to the difference between the amount of depreciation and amortization taken on the emergency facilities. However, this amount can be derived from the other figures shown.

In transmitting to the registrant our views on the income statement as set forth in the third amendment, the staff indicated that the use of the words "before special charges below" in the several captions mentioned above was objectionable. We do not believe this position to be wholly sound. We feel that the existence of large special and unusual transactions ought properly to be forcefully brought to the attention of the reader of the statement. We feel also that the use of appropriate qualifying words such as "see special charges" in connection with the pertinent captions is an appropriate means of warning the reader of the existence of such items as were present in this case.

IV

The Pro-forma Income Statements

In addition to the certified income statements for the years 1942–44, the registrant filed uncertified pro forma income statements under the following general title:

"Virginia Electric and Power Company

"Pro-forma Income Statement for 12 Months ended December 31, 1944,

"Giving Estimated Effect as at January 1, 1944, to Merger,

"Sale of Transportation Properties and Proposed Refinancing."

The actual 1944 income statements of VEPCO, and of Virginia Public Service prior to its merger with VEPCO on May 26, 1944, were shown in two separate columns. In five additional columns there were shown (1) adjustments to give effect to the merger, (2) adjustments reflecting the sale of transportation properties, (3) adjusted statements prior to the proposed refinancing, (4) the refinancing adjustments, and (5) adjusted statements after the refinancing. We are here concerned primarily with the treatment accorded the tax items although some reference to other adjustments may be necessary.

In general, the presentation followed quite closely that used in the certified statements. As originally filed the total of income tax items shown in the two "actual" columns was the same as that shown in the certified statements, $9,953,285. This figure and the adjusted figure were both described as "Taxes—Federal income and excess profits (excluding reductions (1) as shown separately below and (2) of $4,148,050 related to and applied against items charged directly to surplus.") As pointed out earlier, these uncertified statements disclosed that which the original certified statements did not—the aggregate tax reduction resulting from the two items charged to surplus. In the statements filed adjustments of the "actual" tax figure were as follows: [18]

Tax provision as shown in the certified statements	$9,953,285
Add:	
Increase due to 1944 merger and refinancing	362,473
Increase due to redemption of series B, C, and D bonds and issuance of series E bonds	294,552
	$10,610,310
Less:	
Reduction resulting from sale of transportation properties	2,793,565
Adjusted or "pro-forma" tax provision	$7,816,745

A note keyed to the adjusted tax figure read:

"The amount show above for Federal income taxes includes provision for estimated excess profits taxes of $5,661,205 before reductions (1) as shown separately in the income statement and (2) of $4,148,050 related to and applied against items charged directly to surplus, and after deducting estimated postwar credit of $328,900."

Finally, the $609,949 adjustment relating to the emergency facilities was added back at the foot of the income statement just as was done in the certified statements.

The form of this pro-forma statement of income was not criticized in the letter of deficiencies dated April 14th and no change was made by the second amendment. However, when the case was brought to us for directions, as noted above, we indicated that the same treatment should be accorded the pro-forma statements as in the case of the certified statements.

In the third amendment, therefore, the pro-forma statement was revised by eliminating the adjustment related to the emergency facilities, by reducing the initial and adjusted tax

[18] The first amendment raised the amount of bonds being registered from $33,000,000 to $59,000,000. This change required alteration of the amounts of some of the adjustments. However, the form of presentation was not changed from the original filing.

figures to the estimated amount of actual liability therefor, and by segregating the "special charges" so as to show them, in conformity with the certified statements after the third amendment, as a deduction from "Gross income (before special charges below)." The balance was entitled "Gross income (after special charges)." Note C was also revised to read:

"The amount shown above for Federal income taxes includes provision for estimated excess profits taxes (after deducting estimated postwar credit of $100,356) of $903,206 which is after reductions (1) of $609,949 resulting from amortization of emergency facilities and (2) of $4,148,050 related to and applied against items charged directly to surplus."

In the fourth amendment the form of the pro-forma statement was again changed. A figure was now shown labelled "gross income" after which were shown three items; namely, the "special charges" of $4,148,050; interest and amortization, $2,409,075, and amortization of plant acquisition adjustments, $693,168. These were deducted as a group from the gross income figure to give a balance labeled "Net Income." Note C was amended to add the following, "but does not give effect to tax savings of $2,379,096 which are expected to result from the proposed refinancing." [19]

In our opinion, it would be most difficult to prescribe a rigid rule for the handling in "pro-forma" statements of items such as are here in issue. The difficulty is due very largely to the variety of situations dealt with under the name of "pro-forma" statements. For example, that term has been used to describe estimates of future earnings when cast in the form of an income statement. It is also used, as here, to describe a statement in which the actual operations of some past period are altered or adjusted either to "give effect" retroactively to certain specific transactions which have since taken place, or to "give effect" to certain proposed transactions.[20] Where a pro-forma statement reflects a straightforward estimate of future earnings, it would seem that the problem under discussion does not exist, since clearly any amount shown therein as taxes would be based on estimates of future tax rates and future taxable income. In such circumstances there would rarely, if ever, be any occasion for "charges in lieu of taxes" or "tax savings." Here the situation is different. The VEPCO "pro-forma" statements are based on the actual statements for the year 1944. A limited number of adjustments to the actual figures are made to illustrate how certain specified events might reasonably be expected to have altered 1944 reports had such events occurred at the beginning of 1944. In this case these events are (1) the merger with Virginia Public Service on May 26, 1944, and the 1944 re-

[19] This change is not germane to the present discussion which relates to the costs of a previous refunding.

[20] Rule 170 of the General Rules and Regulations under the Securities Act of 1933 prohibits the use of pro forma statements which purport to give effect to the receipt and application of any part of the proceeds from the sale of securities for cash unless the sale of securities is underwritten and the underwriters are to be irrevocably bound, on or before the date of the public offering, to take the issue. *Cf.* Rule X–15C1–9 under the Securities Exchange Act of 1934.

financing; (2) the sale of certain transportation properties during the year and (3) the proposed refinancing. On the other hand no retroactive adjustment was made as to a rate reduction which took effect on April 1, 1945. Such adjusted statements are, of course, useful to the extent they shed light on the future by illustrating the probable scope of the changes now being carried out. They are, accordingly, a hybrid form, being neither *statements of actual operations* nor thorough going *estimates of future earnings*. In the present case, the changes made are relatively few so that, on balance, the adjusted statements are much closer in nature to an actual statement than an estimate of earnings. For that reason, we feel that our views as to the certified statements are applicable to the adjusted statement under discussion. We point out again, however, that here as in the certified statements it is proper to add an appropriate qualifying phrase to such captions as "gross income."

V

The Findings and Opinion of the Commission in the related case under the Public Utility Holding Company Act of 1935

In their appearance before us the certifying accountants criticized certain data as to VEPCO that was included in our opinion in this case under the Holding Company Act.[11] Under the caption "Earnings" we set forth the following:

"Attached hereto as Exhibit B is an income statement of VEPCO for the twelve months ended December 31, 1944, adjusted to reflect the merger of Virginia Public Service Company and the recent sale of transportation properties and pro-forma to reflect the proposed refinancing.

"Gross income, interest and amortization, and pertinent ratios are as follows:

TABLE IV

	Adjusted	Effect of Refinancing	Pro Forma
Gross income before Federal taxes on income	$16,234,038	$.....	$16,234,038
Federal taxes on income[1]	2,764,194	294,552	3,058,746[2]
Gross income	$13,469,844	$294,552	$13,175,292
Interest and amortization	$2,740,710	$331,635	$2,409,075
Ratio of gross income before Federal taxes on income to interest and amortization	5.92	.....	6.74
Ratio of gross income to interest and and amortization[2]	4.91	.....	5.47

[1] Reflects reduction in 1944 taxes of $2,091,177 resulting from redemption of bonds and $2,056,873 resulting from loss on sale of property.

[2] Does not reflect additional reduction in taxes of $2,379,096 to arise from payment of call premium in connection with the instant refunding.

The accountants pointed out that the ratios of gross income to interest and amortization were not at all representative of what might be expected for the future, since the provision for taxes was $4,148,050 less and gross income $4,148,050 more than they

[11] Re Virginia Electric & Power Co. Holding Company Act Release No. 5741, (April 20, 1945).

would have been had the refunding and sale of transportation properties not taken place. They further pointed out that under their proposal either to increase the amount shown for taxes by $4,148,050 or to deduct a special charge of that amount before arriving at gross income the resulting ratios would be 3.40 and 3.75 before and after adjustment for the proposed refinancing. These ratios they believed were far more reliable indications of what might be expected for the future.

The materials included in our opinion show on their face the basis on which the ratios in question were computed. They are, in our opinion, a correct reflection of what occurred in the period. On the other hand, we agree with the certifying accountants that the current period was unusual to the extent at least of the three transactions under discussion.[22] For that reason neither the current period nor ratios based on current results are fairly indicative of future possibilities. However, as will be pointed out in more detail later, we do not think the method of handling such a situation should be to alter or obscure the actual results of operation. Instead, we feel such a situation calls for a clear explanation of the circumstances. In this case, we feel that our opinion should have more graphically explained the situation by giving an additional set of clearly described ratios derived from the adjusted gross income figure referred to by the certifying accountants.

VI

The Treatment of "Tax Savings" in Financial Statements Filed with This Commission

Cases involving the treatment of so-called "tax savings" [23] in financial statements have arisen with increasing frequency in recent months. For that reason, as stated earlier, we feel it desirable to state our views as to the treatment to be accorded such items in statements filed with us and to point out the reasons which have led us to those conclusions.

[22] It should be noted, however, that three of the four years from 1942 through 1945 are "unusual" by this test. In 1942 there were "Special charges" of $1,571,158 in connection with a refunding in that year. In 1944, there were the $4,148,050 "Special charges" in issue here. In 1945, it is estimated there will be $2,379,096 "Special charges" due to the proposed refunding. Only in 1943 were there no "Special charges." For the four years average gross income was $10,808,313 and average "Special charges" were $2,024,576.

[23] We think it undesirable in principle and possibly misleading to refer to this problem as involving "tax savings" although due to the general use of the term in this sense we have adopted that nomenclature here. It seems to us that the term "tax saving" is apt to connote some sort of standard or normal tax law and a standard or normal earnings year to which that law applies. The facts are, of course, that there has not been a static or standard or "normal" tax law or tax status; nor has it been possible except in most unusual cases to characterize any particular fiscal year of a company as a "normal earnings" year, from which all others are to be regarded as a departure. Under such conditions, each year's tax is whatever happens to result from the application of the computation formula, provided by the tax law of that year, to the sum total of taxable transactions and tax deductions resulting from whatever business may have been done in that particular year. Moreover, the past few years during which the term and the problem of "tax savings" appeared have clearly been unusual in nearly every respect. Finally, if the phenomenon in question is to be described as a "tax saving" it would seem necessary to describe as a "tax loss" the failure to carry through a transaction which it can be said would have resulted in a "tax saving." And if taxes in one year are higher should not that increase itself be considered to be a "tax loss." Our strong preference is to describe the problem as involving "tax reductions."

It is first necessary to state briefly certain of our general views as to the functions of financial accounting and the purpose of the income statement. In our opinion financial accounting is essentially historical in nature—it consists of an accounting for costs that have actually been incurred by the business and for the revenues that have been actually derived from the business. From a balance sheet point of view, the question is what part of past expenditures may still be treated as valuable assets, of benefit to future operations, and what part of such expenditures must be considered as having been used up or expired. In order to prepare an income statement, it is necessary to decide what part of the costs that have been incurred should be treated as expenses, and what part of the revenues obtained may be treated as income. Technically this process is sometimes spoken of as matching costs against revenues, the difference being, of course, profit or loss. The principal statement reflecting this matching up process for a particular period is the income statement.

In order to arrive at a more precise matching of revenues and costs, accountancy has developed many procedures for handling particular transactions where the cost is incurred at one time and the benefit is received at another time, either earlier or later.

Much the same treatment is accorded cases in which a company receives revenue either before or after it delivers the goods or services contemplated. Ordinarily, such receipts will be treated as realized income, not necessarily in the year in which the cash is received, but rather in the year in which goods are delivered or in which the service is rendered or the costs of rendering that service are incurred.

It is also necessary as a part of this process of matching costs and revenues, for the purpose of determining income, to consider at appropriate intervals whether any amounts presently reflected as assets in the accounts should in the light of present conditions be written off or reserved against. Finally, consideration must be given to whether there exist contingencies for which provision should be presently made either by recognizing an actual, though perhaps estimated, liability, or by providing an appropriate reserve.

We have elaborated these underlying accounting assumptions in order to demonstrate further that financial accounting is in our opinion concerned with what did happen, not with what might have happened had conditions been different. And it does not attempt to forecast the future even though it supplies much of the material used in making such a forecast.[24]

There is, on the other hand, another field of financial statistics in which statements are used which in form and language are closely similar to the financial statements used in presenting actual balance sheets and income statements. This is the field of finan-

[24] Although we here emphasize the essentially historical character of financial accounting, it is by no means to be inferred that we feel the work done by the financial accountant is therefore mechanical or routine in nature. On the contrary, proper discharge of his duties and responsibilities presupposes that the financial accountant possesses and exercises an extremely high degree of professional skill, experience, and judgment. We discuss this point further at p. 25ff.

cial analysis and forecasting. In essence, the analyst begins with reports of actual operations and conditions and adjusts them to give effect to expected future changes and events in order to arrive at his estimate of future earnings. In one form of analysis and forecasting the analyst is content to comment upon the actual past results, to point out what parts of the past results are due to factors which are not expected to continue and how the existence of new factors and conditions is expected to alter past results. At times, however, the analyst goes further and attempts to prepare an "adjusted" statement which purports to show how past operations would have worked out had certain specified subsequent events taken place earlier. Finally, the analyst may seek to forecast as accurately as may be what he expects will be the results of future operations. Frequently, in such cases, his forecast takes a form very like that used in portraying the results of past operations.

The validity of such analyses and forecasts, whether in the form of "comments," of "adjusted statements," or of "estimated future income statements," is clearly no greater than the soundness of the prophecies and estimates upon which they are based. The results shown, however, are meaningful to a reader only to the extent he is aware of and agrees with or understands the nature of assumptions and estimates made. In contrast to such forecasts, a statement of past operations, even though it is based in important part on opinion and judgment is primarily an historical record of actual events, not of prophesied future events.

The two types of financial statements are obviously in wholly different categories and have different uses in examining the investment merits of a security. Particularly because of the similarity in form, great care must be taken to ensure that the reader will be aware of the nature of the particular statement. Nothing, in our opinion, would be more misleading than to present, in the guise of an actual earnings statement, data which, in fact, was an estimate either of expected future earnings or of the effects of subsequent conditions and transactions on prior operations. The dangers inherent in the situation led us some years ago to adopt rules under the 1933 and 1934 Acts forbidding the use of "pro-forma" statements unless a clear indication is given of the assumptions on which they are based.[25] Also under the 1933 Act we have by rule prohibited altogether the use of "pro-forma" statements in certain cases. Apparently with a similar appreciation of the danger of confusing actual and pro forma income statements the American Institute of Accountants has for many years included in its Rules of Professional Conduct the following:

"12. A member or an associate shall not permit his name to be used in conjunction with an estimate of earnings contingent upon future transactions in a manner which may lead to the belief that the member or associate vouches for the accuracy of the forecast."

Notwithstanding the uncertainty inherent in estimates of future earnings, it is apparent that the formation of a considered investment judgment ordi-

[25] *Supra*, Note 20.

narily involves a conclusion as to the future prospects of the company. It is necessary in the administration of the Public Utility Holding Company Act in arriving at a decision as to the propriety of a particular security in relation to the capitalization and earnings, or as to the fairness of the price at which securities or assets are proposed to be sold. Under the Chandler Act it is a necessary step in arriving at a conclusion as to whether a proposed reorganization is fair and equitable and feasible.

In reaching a judgment as to the future prospects of a company it is customary to begin with a statement of actual operations for an appropriate past period. Because of this use of actual statements of operations, an effort is ordinarily made to present the results of prior years' operations in a form that is as readily usable as possible for that purpose. In general, what is done is to segregate and earmark what are considered to be unusual and nonrecurring items of income, expense, and loss so that the reader will be warned of them and so may arrive at a conclusion as to whether such items can be expected to recur. In addition, special treatment is accorded items of income or loss or expense that have been reported in the financial statements of one year, say 1943, but which by reason of later events or knowledge, are now known to have been actually part of the costs or revenues applicable to another year, say 1942. In such cases, it is customary in filing comparative statements for the two years to include such items in the year to which they are now known to be related. Such adjustments are in our opinion entirely proper and ordinarily desirable provided, of course, that appropriate disclosure is made so that the comparative statements can be reconciled with the 1942 and 1943 statements as originally issued. Finally, disclosure should be made as to significant, known factors that might render past earnings statements, or particular items therein, not indicative of probable future operations.[26] With such information at hand the reader of the statement is informed of what

[26] In our opinion in Re The Colorado Milling & Elevator Co. (Securities Act Release No. 2964, December 20, 1943) we had occasion to emphasize the need for disclosure of major changes in financial and operating factors that rendered statements of past earnings not fairly indicative of what might be expected for the future. In that case the registrant had disposed of a large investment portfolio the income from which had of course been included in past earnings statements, had used the proceeds of this sale and of a $2,000,000 bank loan to pay an extraordinary cash dividend of $7,000,000 and now proposed to issue some $3,000,000 of new 4 per cent debentures. It had entered into new agreements for lines of bank credit at a much higher interest rate. Finally it had materially increased the rate of management compensation and had determined to extend its insurance coverage at a material increase in the amount of insurance premiums payable. In view of these significant changes in financial and operating factors and their material effect on the future earnings of the company we said;

"The net effect of the foregoing will be to diminish the net income available for dividends. Profit and loss statements are required in the registration statement as an indication to prospective investors of the registrant's earning power. The nine-years' profit and loss statement contained in this registration statement reflected the results of operations during a period when the registrant had maintained continuously a financial status substantially equivalent to that existing immediately prior to this financing. By reason of the changes effected since May 22nd, that financial status bears little resemblance to that which obtains presently. Where such changes will have a material effect on prospective earnings, the omission to disclose those changes and their effect with relation to the profit and loss statements is as misleading as if the registrant's past earnings had been misrepresented."

the past operations were, and of the conditions or transaction, which in the draftsman's judgment, are apt to be unusual and not apt to recur. In our opinion, this is the boundary line of financial accounting. It is the place at which the financial accountant in his capacity as such should stop. He is, we feel, essentially a historian, not a prophet.

This desire to prepare statements in a form more readily usable in estimating the future has led some to attempt to present what can be called a "normal" income statement, the inference being that the statement shows about what can be expected to happen year after year. The broad justification alleged for the practice is that if the actual results of the year's operations are unusual a reader may be misled into thinking the abnormalities will recur and that the best, if not the only way, to avoid such misconceptions is to "normalize" the statement —that is, to exclude therefrom the effects of some or all of the conditions which in the opinion of the draftsman are deemed to be unusual.

The dangers inherent in such a practice are numerous. In the first place, the draftsman's judgment as to what is abnormal can scarcely be considered infallible. In the second place, there is certainly as much danger that the reader will fail to understand what has been done by the draftsman as that he will fail to recognize that the unadjusted statements are abnormal. Finally, the method is extremely susceptible of misuse through conscious or unconscious bias in making decisions as to what is unusual or abnormal about the current year. To a degree, of course, the care with which disclosure is made of the extent of normalization may serve to minimize the possibility of misleading the reader. But in general we are satisfied that a statement purporting to reflect the actual results of operations is far less likely to be misleading if abnormalities are explained than if they are eliminated by adjustment in the statement even with an explanation of the elimination set forth in a note.[27] If, of course, a clear and full explanation of the adjustments made is not given, the practice is highly deceptive and may be fraudulent. It may be noted in passing that accountants have long condemned such undisclosed "adjustments" terming them at times a device akin to "equalizing earnings."

We conclude, then, that the proper function of an income statement presenting the results of operations is to present an accurate historical record. On this basis, it is evident that the items included therein should clearly and accurately reflect only actual operations. It is accordingly our view that the amounts shown should be in accordance with the historical facts and should not be altered to reflect amounts that the draftsman considers to be more "normal" or likely to recur in future years.[28]

[27] Where the tax provisions is presented as in the original VEPCO statements or a charge in lieu of taxes shown, we doubt whether any but the most experienced reader of financial statements would be apt or perhaps able to make the calculations necessary to arrive at the amount of net earnings or of net earnings per share based on the actual tax payable.

[28] We do not at this time propose to discuss the practice of treating certain types of losses and income as corrections of surplus rather than as elements of profit and loss to be reflected in the year's income statement. That

We return now to the particular problems presented by the facts in the VEPCO Case. In their appearance before us the certifying accountants objected to our position and defended their proposal on three principal grounds:

(1) That as an accounting matter it is necessary to "allocate" the actual taxes as between charges to surplus and income from operations, even if that practice results in the inclusion in the income statement of a charge (described as taxes or as charges in lieu of taxes) in excess of the actual taxes payable, with an offsetting "credit" or "negative tax" being carried to surplus in amount sufficient to reduce the charge on account of taxes to the amount actually payable.

(2) That the adjustment of the tax figure, or the inclusion of a charge in lieu of taxes in or on a parity with operating expenses, results in the income statement being more useful to investors since it is more nearly indicative of "normal" conditions and probable results in the future.

(3) That in the setting of rates for regulated public utilities it is proper to base future rates on expected future taxes, hence the adjustment method tends to conform the income statement to the basis on which the rates of the company will be set.

For convenience, we shall first discuss the latter two points leaving the allocation argument until last. The second contention we believe to be unsound for the reasons stated in our general discussion of the functions of financial accounting and of income statements reflecting the results of past operations. We think such statements should be historical records of the results of whatever financial events actually took place. It is not the role of the financial accountant to adjust them so as to eliminate the effect of unusual circumstances which actually occurred. Accordingly, we cannot agree with this contention. To include under operating expenses as taxes an amount which is not taxes because the substituted amount is considered by the draftsman to be "normal" is precisely the type of adjustment which we believe unsound in a statement of actual operations. And if the amount of the adjustment is undisclosed the statements are deceptive to a point that may border on fraud. If the fact of adjustment be disclosed but not the amount, the statements are still misleading in our opinion and, at the very best, are useless as reports of actual operations.

There is a related difficulty. If the "credit" to surplus or "negative tax" figure offsetting the enlarged charge to income is netted without disclosure against the loss or expense charged to surplus, the reader will be unable to determine the actual amount of the loss or expense in question. In our opinion such an event as the sale of corporate property at a substantial loss is an important fact. It is no less important because, fortuitously or intentionally, one of these events occurs in a year of high tax rates and high income, so as to effect a substantial re-

question is involved in certain proposed amendments to Rule 5-03 of Regulation S-X which have been distributed for comment to interested persons. The comments received have not yet been fully analyzed, and it is likely that further steps will be taken to develop the nature of the problem and any conflict of opinion as to its proper solution. We feel it inappropriate in this statement to seek to anticipate the outcome of that investigation.

duction in the income taxes payable. There are in these cases *two* facts to be disclosed—the loss on the property, and its tax consequences. Such a transaction ought to be reported in such a manner as not to conceal either the fact that a loss was suffered or the amount of the loss. To report this kind of loss net of its tax consequences is no more supportable in our judgment than to report on a similar net basis an expense such as advertising, depreciation, interest or any other item in the income account.[29]

The third argument advanced in support of the enlarged charge to taxes, or of the charge in lieu of taxes, is that the income tax figure which is a significant factor in respect of the rates of a regulated public utility is not the actual amount of taxes paid but the amount that would have been payable but for the loss or expense carried to surplus. This argument is, of course, limited in its application to public utilities whose rates are subject to governmental regulation. Such companies are ordinarily required to follow a uniform system of accounts and, in most jurisdictions, the prescribed form of income statement shows income taxes as an element of operating expenses, or as is sometimes said "above the line." Generally speaking, items included "above the line" are recognized as expenses allowable in computing the gross income for rate purposes whereas deductions made "below the line," such as interest, and items carried to surplus are not chargeable in this way.[30]

The short answer to this contention

[29] It will be noted that an income statement which is charged only with the estimated amount of taxes actually payable thereby reflects the tax reduction due to special items. Moreover, the benefit of the tax reduction will be reflected in earned surplus, the amount of which will ultimately be the same whichever of the several suggested treatments of these tax reductions is followed.

[30] The deductibility of income taxes in computing return for rate purposes was an issue in Galveston Electric Co. v. Galveston, 258 US 388, 66 L ed 678, PUR1922D 159, 169, 42 S Ct 351. There the Supreme Court speaking through Mr. Justice Brandeis said: "All taxes which would be payable if a fair return were earned are appropriate deductions. There is no difference in this respect between state and Federal taxes or between income taxes and others." This position was reaffirmed in Georgia R. & Power Co. v. Georgia R. Commission 262 US 625, 67 L ed 1144, PUR1923D 1, 43 S Ct 680. These decisions dealt only with the normal income tax then in effect. Therefore, because of certain observations by Justice Brandeis there are those who argue that these decisions may not be controlling as to the present Federal tax, particularly the present excess profits tax. Thus, in the Galveston Case the court took care to point out that under the tax law then in effect the stockholder did not have to include dividends received from the corporation in his income subject to the normal Federal income tax and that this tax exemption was therefore, in effect, part of the return on his investment. Under the current tax law such dividends are taxable to the recipient. The court also said: "But the fact that it is the Federal corporate income tax for which deduction is made, must be taken into consideration in determining what rate of return shall be deemed fair."

The Supreme Court has not yet had before it a case involving the deductibility for rate purposes of an excess profits tax actually paid by the company. Some question as to its deductibility is, however, raised by the language used by Mr. Justice Douglas in his dissenting opinion in Vinson v. Washington Gas Light Co. (1944) 321 US 489, 502, 88 L ed 883, 52 PUR(NS) 257, 265, 64 S Ct 731. He there said, in discussing a provision of the Stabilization Act of 1942 which prohibits any 'utility' from making 'any general increase in its rates or charges which were in effect on September 15, 1942' without giving the Director of Economic Stabilization the right to intervene in the proceedings:

"I believe, moreover, that when Congress halted general rate increases and gave the Director a right to intervene, it did not sanction rate increases regardless of need and regardless of inflationary effect. I think it meant to make Utility Commissions at least partial participants in the war against inflation and gave them a sector of the front to control. Though it did not remove the established standards for rate-making, I do not think it intended Utility Commissions to proceed in

is that in most, if not all cases, the required systems of accounts do not permit a charge to operating expense accounts except for expenses actually incurred.[31] We note that the Committee on Statistics and Accounts of

disregard of the requirements of emergency price control and unmindful of the dangers of general rate increases. To the contrary, I think Congress intended that there should be as great an accommodation as possible between the old standards and the new wartime necessities. The failure of the Commission to make that accommodation is best illustrated perhaps by its treatment of taxes. The Commission allowed the company to deduct as operating expenses all excess profits taxes and income taxes up to and including 31 per cent. That this amount includes wartime taxes is evident from the fact that the highest corporate tax rate which prevailed from 1936 to 1939 was 19 per cent. We all know that the extraordinary expenditures incurred for the defense of the nation started with the Revenue Act of 1940. It has been accepted practice to deduct income taxes as well as other taxes from operating expenses in determining rates for public utilities. Galveston Electric Co. v. Galveston, 258 US 388, 399, 66 L ed 678, PUR1922D 159, 42 S Ct 351. But this is war, not business-as-usual. When income taxes are passed on to consumers, the inflationary effect is obvious. And it is self-evident that the ability to pass present wartime income taxes on to others is a remarkable privilege indeed."

In Detroit v. Public Service Commission (1944) 308 Mich 706, 54 PUR(NS) 65, 66, 14 NW(2d) 784, the Michigan supreme court held, with three Justices dissenting, that the Galveston Case did not control the treatment in rate cases of the present Federal excess profits taxes. Writing for the majority, Justice Bushnell said: "As I read Galveston Electric Co. v. Galveston, 258 US 388, 399, 66 L ed 678, PUR1922D 159, 42 S Ct 351, which is intimated by my brother as controlling, its authority is limited to normal taxes and not to abnormal and avoidable taxes on 'excess profits' even though it must be conceded that the term by which such tax is designated is a misnomer. Excess profits are a question of fact for determination by the Commission."

A similar result was reached by the West Virginia supreme court in denying the deductibility of the excess profits taxes levied during the first World War. Charleston v. Public Service Commission, 95 W Va 91, PUR1924B 601, 120 SE 398.

In its decision in Detroit v. Panhandle Eastern Pipe Line Co. (1942) 3 Fed PC 273, 291, 45 PUR(NS) 203, 219, the Federal Power Commission expressed its objection to the allowance of excess profits taxes in computing returns as follows:

"Thus it appears that the doctrine of unjust enrichment as well as equity and good conscience compel the conclusion that a utility should not be permitted to thwart the purpose and spirit of the war price control legislation and the revenue laws by passing such abnormal tax requirements along to its consumers as an operating expense to be collected in increased rates. Indeed, we feel increased rates on such a basis would be unjustifiable. To allow them would in effect impose upon the consumers a sales tax.

"So that there may be no confusion concerning the tax situation in connection with the companies subject to our jurisdiction, where necessary to stabilize utility rates at reasonable levels during the war emergency period, we propose to allow as proper operating expenses only such taxes as may be termed ordinary or normal. For the purpose of distinguishing between ordinary or normal and war emergency or abnormal taxes, we conclude that the basis prescribed in the 1940 Revenue Act establishes the highest possible level of Federal taxes which may be allowed as an element of operating expense for such purpose. The 1941 Revenue Act and the pending 1942 proposal certainly reflect abnormal tax requirements for war purposes."

The Federal Communications Commission in Re Investigation of Rates and Charges for Communications (Fed CC 1943) 50 PUR (NS) 468, 489, also disallowed a deduction for excess profits taxes. The trend of a number of state Utility Commission decisions seems to be to limit or deny the deductibility of excess profits taxes. See in Re Los Angeles Gas & E. Corp. PUR1922A 283 (Cal); Re Western States Gas & E. Co. PUR1919B 485, 493 (Cal); Re Vallejo Electric Light & P. Co. (Cal 1944) 55 PUR(NS) 435, 443, 454; Re United Fuel Gas Co. PUR1920C 583, 606 (WVa); Public Service Commission v. Springfield Gas & E. Co. (Mo 1944) 53 PUR (NS) 95, 105; Re Washington Gas Light Co. (DC 1943) 53 PUR(NS) 321, 327, 336; Re Northern States Power Co. (ND 1944) 55 PUR(NS) 257, 273. Cf. Re British Columbia Electric R. Co. (BC 1943) 53 PUR(NS) 438, 464. An excess profits tax which had been neither reported to the government nor paid was not allowed as a deduction in Public Service Commission v. Utah Power & Light Co. (Utah 1943) 50 PUR(NS) 133, 167. But see Pfeifle v. Pennsylvania Power & Light Co. (Pa 1945) 57 PUR(NS) 1, 32; San Antonio Pub. Service Co. v. San Antonio, PUR1924A 259, 263 (Texas); Detroit v. Detroit Edison Co. (Mich 1943) 50 PUR (NS) 1, 3.

In the instant VEPCO Case it will be noted that the registrant's computations as to the tax effect of the special items resulted in an adjustment of excess profits taxes only; no adjustment of normal taxes is indicated. See Exhibits A-D.

[31] Under our Rule U-28, moreover, a regis-

the National Association of Railroad and Utilities Commissioners has, in Case E–80, so interpreted the N. A. R. U. C. classification.[32]

We think, moreover, that this contention of the accountants in this case is unsound on its face. The costs and expenses, including interest, that arise from the borrowing of capital are almost universally excluded from the computation of gross income for rate-making purposes. To include in operating expenses by indirection an item which is specifically excluded therefrom is obviously improper. Yet this is what is here proposed. The credits, in this case, that offset the charge in lieu of taxes have been deducted from the refunding expenses and the loss on sale of transportation properties, respectively, so that the charge to surplus is a net charge. To include in operating expenses part of the refunding expenses either directly or in the guise of a special charge in lieu of taxes is a violation of the premise that the costs of borrowing money are not a deduction in computing return for rate purposes. It would be as logical to say that the interest paid in a given period reduces the income tax payable and that therefore a charge in lieu of taxes should be included above the line with an offsetting reduction in interest expense below the line.

Finally, this contention seems to us to misconceive the relation of past results to the process of rate making. Where rates are being set for a future period, it is obvious that the actual results of past operations are only indications of what may be expected to be forthcoming in the future The problem is, broadly, to determine what future earnings may be expected to result from particular rate structures. Consequently, it is customary to "adjust" many of the past operating expenses to bring them into line with present or anticipated conditions. Among such conditions are, of course, future taxes and tax rates. Accordingly, in the approximations made of future expenses there would be included not the actual taxes of the past year, or even what the taxes would have been had there been no unusual transactions such as a bond refunding, but instead an amount equivalent to what the income tax will be in the future in view of the assumptions made as to future income and future tax rates.[33] The amount of past taxes

tered holding company or subsidiary company thereof is forbidden to "distribute to its security holders, or publish, financial statements which are inconsistent with the books of account of such company or financial statements filed with this Commission by, or on behalf of, such company."

[32] Case E–80 reads as follows:

"*Question:*

"Several utilities which have refunded bond issues, have had substantial tax savings in the year the refunding occurred, because the unamortized debt discount, expense and call premium associated with the refunded securities is permitted as an income tax deduction during the year redeemed. Instead of showing the actual taxes paid or accrued in the tax account, the utilities in question have also included therein the amount of the tax saving due to the refunding operation with an offsetting credit usually to Account 140, Unamortized Debt Discount and Expense. Is this permissible?

"*Answer:* No.

"The tax account (507) should include only provision for actual taxes and the account should not be increased by the amount which would have been paid had the refunding transaction not occurred. In other words, there was an actual saving in taxes and this saving should be reflected in the income statement because it is a fact. It is believed, too, that the text of Account 507 does not permit the accounting practice resorted to by the utilities in the illustration cited."

[33] In State ex rel. United Teleph. Co. v. Public Service Commission (1935) 336 Mo 860, 9 PUR(NS) 259, 264, 81 SW2d 628, the

would be used only if, after examination, it was concluded that tax rates and future income were not expected to change.[34]

The rate-making process is thus not unlike the formulation by the investor of his judgment as to the future prospects of the company. In both cases, reports of actual past operations are used as a starting point. In both cases, these actual statements are analyzed to determine the extent to which they may be relied on as indicative of the future and, where necessary, appropriate adjustments are then made. Except that the possibility of misleading the reader is very largely absent when the user is a rate making body, the comments we have made earlier as to pro-forma statements are applicable here—and with this addition that the judgment of the draftsman as to what is the normal or proper amount of taxes is less important, since for rate purposes the judgment of the rate-making body on this point will generally be conclusive.

We come next to the remaining contention urged by the certifying accountants, that as a matter of correct accounting it is necessary to "allocate" income taxes to income and other accounts. This theory is also advocated and developed in detail in a bulletin "Accounting for income taxes" issued in December, 1944, by the Committee on Accounting Procedure of the American Institute of Accountants.

There is no doubt that allocation is a basic accounting procedure. In fact the whole process of preparing income statements is a species of allocation—of determining what revenues are allocable to the current income account and what expenditures are properly to be treated as costs allocable to the current income account. It is not therefore a demonstration of the merit of the proposed device to describe it as an allocation or to say that income taxes should be allocated. Whenever an item is charged to income, or indeed when it is excluded and carried as an asset, "allocation" in the accounting sense has taken place. The issue here is not whether income taxes should be allocated but whether the treatment of income suggested by the accountant's third contention is preferable to the method of allocation

court held that only taxes actually payable need be considered: "The ninth and last point urged in appellant's brief is that 'the Commission's action in refusing to allow the inclusion of Federal income taxes as operating expenses was error.' The undisputed evidence is that the company did not pay income taxes. We are not aware of any authority holding that in such case an allowance of this kind should be made, and counsel for appellant cite none." See also Re East Ohio Gas Co. (1937) 17 PUR(NS) 433, 445. In Public Service Commission v. Utah Power & Light Co. (1943) 50 PUR(NS) 133, 167, the company had sought to justify the reasonableness of certain rates by including $1,480,000 of "computed" excess profits taxes in operating expenses. In fact the company neither reported on its tax returns nor paid any excess profits tax. This "computed tax" item thus resembles very closely the so-called "tax savings" in question here. The Utah Commission disallowed the claimed deduction saying: "The injustice to Utah rate payers is obvious when excessive rates and earnings are made to appear to be reasonable by means of computed excess profits taxes which have not been paid or reported to the government. We reject the company's claim that its computed (but not reported or paid) excess profits taxes should be included in the cost of service and thus passed on to the ratepayers." . . . (At p. 169.)

[34] Where a "sliding-scale" formula is in operation, the actual results of current operations, including taxes, are determinative of future rates. In such a case there would, it seems to us, be danger of grave injustice in applying the formula to the results of actual operations for the year which, however, reflected a deduction based on income taxes that were neither paid nor payable by the company.

heretofore followed—that is, to show as a deduction from income of the current year the income and excess profits taxes which are believed to be actually payable, under the applicable tax law, as taxes of the current year.

In the argument before us and in the bulletin mentioned it has been urged that income taxes are an expense that should be allocated as other expenses are allocated. In neither case, however, was there any effort made to state the reasons why Federal income taxes must be considered as an expense in the same category as, let us say, wages. It is obvious, of course, that the net profit applicable to stockholders cannot be determined without first making an appropriate allowance for the amount that must be paid as income taxes. However, this fact does not dispose of the question. It is readily apparent that normal and excess profits taxes are computed as a *part of* taxable net income. Unlike most expenses they exist if, and only if, there is net taxable income before any deduction for such taxes. There is much to be said therefore for the position that true income taxes are in the nature of a share of profits taken by the government. If it is desired to place emphasis on the necessity of deducting them in order to arrive at net profit available to shareholders, they may perhaps be called an expense—but in such case they represent a very special class of expense, one that is incurred only by the making of a net taxable income.

Accordingly, to the extent that the propriety of the proposed treatment of income taxes depends on their classification as an expense rather than a share in profits, we feel that the case remains unproven. Even if they be so classified, we feel that in view of their unusual and distinctive characteristics the propriety of the proposed treatment is not demonstrated merely by classifying them as an expense and then concluding that for that reason they should be allocated as other expenses are allocated.

We now examine the contention that income taxes should be allocated "as other expenses are allocated." The accountants who appeared before us cited to us no other expense which, for general accounting purposes, is allocated in the manner proposed for income taxes, nor have any such instances otherwise come to our attention. We note, moreover, that in a dissent to the bulletin mentioned earlier it was stated:

"No expense other than Federal income and profits taxes is allocated on the basis of applying to a given transaction so much of the expense as would not have occurred if the transaction to which the expense is attributed had not taken place. The usual method is to allocate a total expense ratably to given accounts or transactions on a consistent basis."

The illustrations of expense allocation cited to us by the certifying accountants in this case appear to us to support the above statement. In each case cited there was an expense actually incurred that was first allocated to the period under the usual accrual principles and then distributed over a number of accounts. In no case was there an estimate made of what the expense would have been under other conditions. In no case cited, was there a distribution of an expense to several

accounts by means of what can be termed an algebraic formula in which a negative sum is credited against one item to offset the positive charge to another item of an amount in excess of the actual expense. We do not regard such a treatment as an appropriate means of allocating income taxes in financial statements which purport to reflect the actual results of operations. We have doubt indeed that such a method can properly be termed an allocation at all, as that term is customarily used.

We note, in passing, moreover, that in the examples of expense allocation cited to us there existed a direct, almost physical association between the item being allocated and the item to which it was charged. For example, in the case of real estate taxes allocated to construction the tax item is directly and closely related to the construction. Likewise, in the case of brokerage fees, and stamp or transfer taxes, the tax item is closely and directly related to the specific transaction. *In both cases, moreover, the tax is independent of any other transactions of the company.* Nor is there any attempt made to increase in the course of the allocation the amount of such taxes to an estimated sum. We feel therefore that such illustrations cannot properly be cited in support of the proposed treatment for income taxes.

It is also sometimes pointed out that "cost" in the case of securities or property acquired is generally considered to be the sum of the purchase price plus incidental costs such as brokerage and any specific taxes paid by the buyer and that on sale the proceeds are computed as the selling price less incidental deductions such as commissions or any specific taxes paid by the seller. By analogy and in justification of the proposed treatment of income taxes it is frequently urged that a so-called "tax saving" must be allocated or attributed to or ultimately associated with particular losses or expenses because the tax consequences of the transaction involving the loss or expense were a motivating factor in arriving at the decision to consummate it. Thus, it is claimed that a property would not have been sold but for the "tax saving" thereby effected and that for this reason it is proper to consider that the true "loss" on the sale is not the excess of cost over selling price but is equal instead to the difference between cost on the one hand and selling price *plus* "tax saving" on the other. We do not believe such an analogy is sound and we cannot accept that analysis as a basis for reporting the results of actual operations. It is undoubtedly true that the tax consequences of selling a property often are an important consideration in arriving at the decision to sell, and may in some cases have been a deciding factor. However, tax consequences undoubtedly play an important role in the making of a great variety of decisions involving the incurrence and amounts of purely operating expenses such as advertising, wage rates and bonus plans. Yet it can hardly be argued that wages or bonuses or advertising are to be reported as less in amount because income taxes would have been higher if the amounts spent on such items were less. We see no basis for adopting a different approach in figuring the "loss" involved in a sale of property. We feel instead that

there has been a loss of the full difference between cost and selling price coupled with a tax benefit which is properly reflected in the lower taxes actually paid. We feel that the proposed treatment of income taxes tends to obscure these facts and that the treatment of income taxes required by our rules and heretofore almost universally followed clearly discloses what has taken place. Where the tax paid for the year is unusual in amount because of unusual conditions, an appropriate explanation would be called for as is now required in the case of other unusual events.

As to this last principal contention urged by the certifying accountants (that income taxes are an expense that should be allocated as other expenses are allocated) we feel, first, that there is grave doubt whether income taxes can properly be considered as an expense in the same category as the cost of materials or wages, and, second, that the treatment proposed does not result in the allocation of income taxes "as other expenses are allocated." We feel instead that the proposed treatment is purely an effort to have items shown in the income statement at what is considered to be a "normal" amount. We note that this objective is clearly expressed as a prime purpose of the method in the bulletin referred to earlier, which states at p. 185:

"As a result of such [unusual] transactions the income tax legally payable may not bear a *normal* relationship to the income shown in the income statement and the accounts therefore may not meet a *normal* standard of significance." (Italics supplied.)

There are, finally, a number of difficulties involved in the proposed treatment of income taxes that deserve mention even though they are not directly related to the specific contentions put forward by the certifying accountants in the case.

The first involves the preparation of general statistical data from financial reports. Under the method proposed, it is permissible to show, as taxes, an amount in excess of the taxes payable. If such items are totaled for a period of years or for groups of companies, they may well be used as evidence of the aggregate amount of taxes paid by the company or by the industry. Obviously any such representation is erroneous and will misstate, often very materially, the underlying facts. We feel that we should not permit the filing with us of income statements which readily permit, if they do not actually invite, such misuse. Even a "charge in lieu of taxes" may result in distorted over-all statistics since it operates to reduce net income after taxes and so affects the ratio of actual taxes to net income. If the offsetting credit is netted against a surplus charge the distortion may be permanent.[35]

The second and somewhat technical

[35] Under one variant of the practice no change is made in *final net income*. In the statements originally filed in the instant case, for example, part of the amount included as a charge among the operating expenses represented a $609,949 reduction in income taxes due to the taking for tax purposes of accelerated amortization of emergency facilities at the rate of 20 per cent a year while in the financial statements only normal depreciation was being accrued. See p. 11 *supra* and Exhibit A. In the original statements this $609,949 was added back as the last item in the account. This internal in-and-out treatment appears to us to suffer from all of the difficulties we have discussed even though no change results in the

problem is the difficulty of the computation. It is usual in contemplating the tax consequences of a proposed transaction to treat it as an incremental or marginal item. Where tax rates are graduated, this results in associating the marginal income or expense with the highest tax bracket. It is questionable, whether such a principle is realistic when applied to the results of operations for a completed year. Net taxable income is a composite of all taxable income and all deductible items applicable to the period. The propriety of singling out any specific item as the item which is taxed in the highest tax bracket, is doubtful. Moreover, in applying the theory to losses and expenses it would appear that the existence of a reduction in taxes is due not only to the expense but is equally dependent on the existence of taxable income to offset the expense. It would appear possible that some part of the benefit from the "reduction" ought to be attributed to the existence of income.[35] Even if this point be waived, however, there has been no satisfactory analysis presented of the effect to be given to the carry-back, carry-forward provisions of the present income tax law. Without exploring all of the possible difficulties, one case may be cited. Suppose that a loss has been charged to surplus but is deductible for taxes. Suppose further that in accordance with the present proposal there is charged to income, as provision for taxes, the amount of $200,000 although the actual tax amounts to only $50,000. If in the next year the company suffers an operating loss of $500,000, then in view of the carry-back provisions the reader of the two income statements would reasonably expect to find a carry-back refund of $200,000—the amount shown as taxes in the first year. However, obviously no more than $50,000 would actually be refundable. The question arises whether having overstated taxes in the first year it is not necessary, to be consistent, to overstate the refund in the second year. Finally, there are the permutations in the computation where a company pays taxes as a member of a consolidated group. In addition to the allocation of the actual tax paid among the several companies in the group, the proposed treatment raises the difficult question of whether the amount of the so-called "saving" is to be computed on the basis of a company's individual status or on that of the consolidated group and, once this is decided, of whether to allocate this "saving" as between the several companies or attribute it solely to the company having the deduction—even

amount of "net income." In our opinion, an overstatement of operating expenses is not corrected by "adding back" the amount of the overstatement at a later point in the income statement. Such treatment is in our view artificial and deceptive to all but the most experienced reader. While there may be some grounds for crediting such reductions in taxes to a special amortization reserve there is none for the equivocal practice here followed.

[36] We note the customary solution of a somewhat similar problem that arises when a group of companies files a consolidated tax return. In assigning to each constituent its fair share of the consolidated tax paid by the group it is usual to divide the actual tax among the companies who would have had to pay a tax on an individual basis. If one of the included companies operated at a loss, the consolidated tax is of course reduced, but no part of the "saving" is ordinarily paid over to the loss company by the other members of the group. Instead, only those *contributing* income to the consolidated return share directly in the benefit of the current reduction. This principle is incorporated in our Rule U-45 under the Public Utility Holding Company Act.

though perhaps it itself contributed no taxable income!

The third difficulty is the propriety of singling out the income tax item for adjustment on the ground that it does not bear a "normal" relationship to the income reported. Particularly, under conditions like the present, many if not most of the income and expense items bear unusual relationships to each other. Under the influence of the war sales volumes are often very high. Maintenance may be very high due to continuous operation of the plant, or very low because of the inability to obtain materials and labor, or very high because of the use of inexperienced labor and the inability to get new machinery, or very low because operations cannot be stopped long enough to make thorough-going maintenance possible. Selling costs may be very low because of the volume of war business or very high because of the use of advertising to keep restricted products in the public's mind. With many items of income and expense apt to be out of line, there appears to be little justification and a good deal of danger in singling out one item for adjustment.

EXHIBIT A

Virginia Electric and Power Company and Subsidiary and Virginia Public Service Company and Subsidiaries, Combined

Condensed certified statement of income for 1944 as shown in original registration statement and after amendment No. 1 [1]

Item	Amount
Operating Revenues	$51,681,778
Operating Expenses and Taxes:	
Other than taxes	28,237,367
Taxes, excluding reductions shown separately below or applied against items charged directly to surplus:	
Federal income (Note C)[1]	2,139,496
Federal excess profits (Note C)[1]	8,164,872
Postwar credit	(351,082)
Other	4,131,408
Total	42,322,060
Net operating revenues	9,359,718
Other income	(45,359)
Gross income	9,314,359
Deductions from income:	
Interest and amortization, etc.	3,719,527
Net income	5,594,832
Reduction in Federal income and excess profits taxes resulting from the amortization of facilities allowable as emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	609,949
Balance transferred to earned surplus	$6,204,781

[1]Note C to the income account as set forth in the registration as originally filed read as follows:

"C. *Federal Income and Excess Profits Taxes*

"*Virginia Public Service Company and Subsidiaries*—The statements of income for the year 1942 include provision for Federal normal income and excess profits taxes computed on the basis of taxable net income after deducting unamortized debt discount and expense, call premium and duplicate interest on long-term debt called for redemption in 1942. The reduction resulting from the availability of these nonrecurring deductions in computing the amount of 1942 taxes payable amounts to $1,571,158 and an equal amount has been deducted in the accompanying statements of income for 1942 as special amortization of debt discount and expense. The balance of unamortized debt discount and expense, call premium and duplicate interest on long-term debt called for redemption in 1942 was charged against earned surplus.

"However, the taxable net income as computed did not reflect the deduction, for tax purposes, of losses upon sales of ice and railway property, and certain other items charged to surplus. As a result, provisions charged to income in 1942 were approximately $330,000 in excess of the company's liability for Federal income taxes as shown in its tax return for that year. Pending review of the returns, this excess provision is included in accrued Federal income and excess profits taxes at December 31, 1943.

"In 1943 the company filed a claim for refund of 1941 Federal taxes in the net amount

EXHIBIT B

Virginia Electric and Power Company and Subsidiary and Virginia Public Service Company and Subsidiaries, Combined

Condensed certified statement of income for 1944 as shown in Amendment No. 2

Item	Amount
Operating Revenues	$51,681,778
Operating Expenses and Taxes:	
Other than taxes	28,237,367
Taxes:[1]	
Federal income[2]	2,139,496
Federal excess profits[2]	3,406,871
Postwar credit	(351,082)
Other	4,131,408
Total operating expenses and taxes before special charges	37,564,061
Special charges equivalent to reduction in Federal excess profits taxes resulting from special amortization of emergency facilities (reduction shown separately below) and from redemption of bonds and sale of property (reductions applied against related items charged to surplus)	4,757,999
Total operating expenses and taxes including special charges	42,322,060
Net operating revenues	9,359,718
Other income	(45,359)
Gross income	9,314,359
Deductions from income:	
Interest and amortization, etc.	3,719,527
Net income	5,594,832
Reduction in Federal income and excess profits taxes resulting from the amortization of facilities allowable as emergency facilities under the Internal Revenue Code, which facilities are expected to be employed throughout their normal life and not to replace existing facilities	609,949
Balance transferred to earned surplus	$6,204,781

EXHIBIT C

Virginia Electric and Power Company and Subsidiary and Virginia Public Service Company and Subsidiaries, Combined

Condensed certified statement of income for 1944 as shown in amendment No. 3

Item	Amount
Operating Revenues	$51,681,778

of approximately $297,000 under the carry-back provisions of the 1942 Revenue Act. However, this amount is subject to such adjustments as may result from review by the U. S. Treasury Department and the claim has not been recorded upon the books of the company.

"Federal income and excess profits tax returns for the company and its subsidiaries for years prior to 1942 have been examined by the Treasury Department and those for the years prior to 1941 have been closed, except for the year 1937 in respect of which a claim for refund is pending."

First Amendment:

The following paragraph was added to Note C:

"*Virginia Electric and Power Company*—In addition to the reduction in Federal taxes on income shown in the income statement for 1944, reductions in excess profits taxes aggregating $4,148,050 have been applied against items charged directly to earned surplus."

The first paragraph of Note C as above quoted was also modified to reflect an amendment to the form of the profit and loss statement for Virginia Public Service Company. As amended the paragraph reads as follows:

"*Virginia Public Service Company and subsidiaries*—The statements of income for the year 1942 include provision for Federal normal income and excess profits taxes computed without the benefit of the deduction of unamortized debt discount and expense, call premium and duplicate interest on long-term debt called for redemption in 1942. The reduction resulting from the availability of these nonrecurring deductions in computing the amount of 1942 taxes payable amounts to $1,571,159 and an equal amount has been deducted in the accompanying statements of earned surplus for 1942 from the balance of unamortized debt discount and expense, call premium and duplicate interest on long-term debt called for redemption in 1942."

[1] The language "excluding reductions shown separately below or applied against items charged directly to surplus" included in original registration and Amendment No. 1 was deleted from this caption by Amendment No. 2.

[2] *Federal income and excess profits taxes.*

Note C to the income account as shown in the registration as originally filed after Amendment No. 1 was changed by Amendment No. 2 as follows:

The paragraph added by the first amendment was deleted. Also the first paragraph of the original Note C was deleted.

Operating Expenses and Taxes:	
Other than taxes	28,237,367
Taxes:	
Federal income (Note C)[1]	2,139,496
Federal excess profits (Note C)[1]	3,406,872
Postwar credit	(351,082)
Other	4,131,408
Total operating expenses and taxes (before special charges below)	37,564,061
Net operating revenues (before special charges below)	14,117,717
Other income	(45,359)
Gross income (before special charges below)	14,072,358
Special charges equivalent to reduction in Federal excess profits taxes resulting from redemption of bonds ($2,091,117) and sale of property ($2,056,873) (reductions applied against related items charged to surplus)	4,148,050
Gross income (after special charges)	9,924,308
Deductions from income:	
Interest and amortization, etc.	3,719,527
Net income	$6,204,781

EXHIBIT D

Virginia Electric and Power Company and Subsidiary and Virginia Public Service Company and Subsidiaries, Combined

Condensed certified statement of income for 1944 as shown in Amendment No. 4

Item	Amount
Operating Revenues	$51,681,778
Operating Expenses and Taxes:	
Other than taxes	28,237,367
Taxes:	
Federal income (Note C)[1]	2,139,496
Federal excess profits (Note C)[1]	3,406,872
Postwar credit	(351,082)
Other	4,131,408
Total operating expenses and taxes	37,564,061
Net operating revenues	14,117,717
Other income	(45,359)
Gross income	14,072,358
Deductions from income:	
Interest and amortization, etc.	3,719,527
Special charges of those portions of premium and expenses on redemption of bonds ($2,091,177) and of loss on sale of property ($2,056,873) which are equivalent to resulting reduction in Federal excess profits taxes	4,149,050
Net income	$6,204,781

[1] *Federal income and excess profits taxes.*

Note C to the income account as shown in the registration as originally filed and after Amendments 1 and 2 was changed by Amendment No. 3 by adding the following two paragraphs:

"*Virginia Electric and Power Company*—In addition to the reductions of Federal excess profits taxes payable for the year 1944 which resulted from costs and losses charged to surplus and for which special charges of equivalent amounts have been made in the income statement for that year, such taxes were further reduced $537,496 by reason of the deduction for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under § 124 of the Internal Revenue Code. No provision has been made in the company's accounts or income statement for such additional amortization, since it is expected that the related facilities will be employed throughout their normal life and will not replace existing facilities.

"*Virginia Public Service Company and subsidiaries*—Federal excess profits taxes payable for the period from January 1 through May 25, 1944, were reduced $72,453 by reason of a deduction for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under § 124 of the Internal Revenue Code. No provision has been made in the companies' accounts or income statement for such additional amortization, since it is expected that the related facilities will be employed throughout their normal life and will not replace existing facilities."

[1] *Federal income and excess profits taxes.*

Note C to the income account as finally amended comprised 6 paragraphs. Three were identical wtih paragraphs 2, 3, and 4 of the original note. The other three read as follows:

"*Virginia Electric and Power Company*—Federal excess profits taxes payable for the year 1944 were reduced $4,685,546 by reason of deductions for tax purposes of redemption premiums and expenses incurred in refunding of bonds, of a loss sustained on the sale of transportation property and of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency

PENNSYLVANIA SUPERIOR COURT

City of Pittsburgh et al.

v.

Pennsylvania Public Utility Commission, Peoples Natural Gas Company, Intervenor

Nos. 93, 94

— Pa Super Ct —, 44 A2d 614

November 20, 1945

APPEAL *from orders reducing natural gas rates; appeal of one party quashed and orders reversed and remanded. For opinion of Commission see (1942) 47 PUR(NS) 385, which follows opinion in (1942) 43 PUR(NS) 82. Earlier court decisions in (1940) 141 Pa Super Ct. 5, 35 PUR(NS) 75, 14 A2d 133; (1943) 153 Pa Super Ct 475, 51 PUR(NS) 129, 34 A2d 375.*

Appeal and review, § 9 — Orders appealable — Rate order.

1. A final rate order of the Commission based upon testimony developed by the parties involved was not administrative merely but resulted from the exercise of the Commission's quasi judicial functions, and was reviewable, p. 229.

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facilities under § 124 of the Internal Revenue Code. There have been included in the income statement for 1944 as special charges those portions of the refunding costs ($2,091,177) and of the loss on sale of property ($2,056,873) which are equivalent to the reductions in taxes resulting from these particular transactions, the remainder of such costs and loss being charged against earned surplus. No provision has been made in the company's accounts or income statement for the additional amortization allowable in respect of emergency facilities, since it is expected that the related facilities will be employed throughout their normal life and will not replace existing facilities.

"Virginia Public Service Company and subsidiaries—The statements of income for the year 1942 include provision for Federal normal income and excess profits taxes computed on the basis of taxable net income after deducting unamortized debt discount, call premium and expense on long-term debt called for redemption in 1942. The reduction resulting from the availability of these nonrecurring reductions in computing the amount of 1942 taxes payable amounts to $1,571,158 and an equal amount has been deducted in the accompanying statements of income for 1942 as a special charge of debt discount, call premium and expense. The balance of unamortized debt discount, call premium and expense on long-term debt called for redemption in 1942 was charged against earned surplus.

"Federal excess profits taxes payable for the period from January 1 through May 25, 1944 were reduced $72,453 by reason of a deduction for tax purposes of amounts, in excess of depreciation provided for at usual rates, allowable as amortization of emergency facilities under § 124 of the Internal Revenue Code. No provision has been made in the companies' accounts or income statement for such additional amortization, since it is expected that the related facilities will be employed throughout their normal life and will not replace existing facilities."

Appeal and review, § 80 — Municipality as party — Rate order.

2. A municipality as a consumer-complainant in a rate case had the right to appeal from the final order entered in the case, since it had an interest in the subject matter and was affected by such order, p. 229.

Appeal and review, § 80 — Parties — Rate order.

3. A small consumer of natural gas may not appeal from an order reducing the rates of the company serving him where he was never a party to the rate proceeding, p. 229.

Appeal and review, § 33 — Independent investigation — Rate order.

4. An appellate court, in entertaining an appeal by a municipality, as a consumer-complainant, from a rate order, may not make independent findings of fair value and reasonable rate of return where the utility involved has not attacked the order as confiscatory and where no constitutional right of the city has been invaded, p. 229.

Appeal and review, § 53 — Commission order — Basis for reversal and remand.

5. A court reviewing a rate order may set aside the order and remand the record only for error of law or lack of evidence to support the finding, determination, or order of the Commission, p. 229.

Rates, § 134 — Reasonableness — Comparison with competitor's rate.

6. That natural gas rates approved by the Commission are higher than those of another natural gas company serving in the same area is unimportant, since what a utility may be entitled to earn is a question to be decided in each particular case and is not governed by an over-all-end judgment of what companies of the same class ought to charge for their product, p. 230.

Return, § 9 — Fair value basis.

7. The Court, in determining what a public utility company may charge its customers, must accept fair value of its property used and useful as the basis of rate making, p. 230.

Return, § 9 — Fair value basis — Effect of Federal court decision.

8. Decisions of the Supreme Court of the United States in cases under Federal statutes accepting standards other than fair value for rate-making purposes, do not change the present state law requiring the fair value basis, since that remains a question for the legislature, so long as the state Commission views are unmodified by a court of higher authority, p. 230.

Valuation, § 16 — Effect of expensed property.

9. Expensed property (originally charged to operating expense) was properly excluded from a natural gas company's rate base, p. 231.

Valuation, § 36 — Rate base determination — Original cost — Effect of price changes.

10. A natural gas rate base cannot be determined solely from a finding of depreciated original cost of the company's property where there have been changes in price levels and no adjustments have been made to effect price trends disclosing fair value as of the applicable date, p. 232.

Valuation, § 39 — Weight of evidence — Reproduction cost testimony.

11. The difficulties inherent in appraising reproduction cost testimony do not relieve the Commission from determining its probative weight, bearing

in mind that the burden of proof to show that the rate involved is just and reasonable is on the public utility, p. 232.

Appeal and review, § 71 — Rate order — Independent investigation.

Statement, in dissenting opinion, that an appellate court may make a complete, instead of a partial, correction of errors made in its former decision on appeal from a rate order, since the principle of "the law of the case" has little, if any, application in public utility rate cases, p. 235.

Valuation, § 36 — Rate base determination — Original cost basis.

Statement, in dissenting opinion, that original cost less depreciation is a ready and equitable element for making a finding of fair value and for ultimate fixing of rates, p. 241.

Valuation, § 100 — Accrued depreciation estimates — Straight-line method — Age-life method.

Statement, in dissenting opinion, that the straight-line or age-life method is proper for determining the amount of depreciation to be deducted from the cost of a public utility plant, p. 241.

(RHODES and ROSS, JJ., dissent.)

Before Baldrige, PJ., and Rhodes, Hirt, Dithrich, Ross, and Arnold, JJ.

APPEARANCES: Anne X. Alpern, City Solicitor, and Leon Wald, Assistant City Solicitor, both of Pittsburgh, for appellants; James H. Duff, Attorney General, Harold A. Scragg, Counsel, and Samuel Graff Miller, Sr. Counsel, both of Harrisburg, for the Commission; James B. Sayers, G. Kirby Herrington, and James L. White, all of Pittsburgh, and Wm. A. Dougherty and C. W. Cooper, both of New York city, for Peoples Natural Gas Co., intervening appellee.

HIRT, J.: The history of this proceeding, beginning with the original inquiry of the Commission in 1937, appears in our opinions, disposing of two former appeals of the Peoples Natural Gas Company from orders of the Commission, reported in Peoples Nat. Gas Co. v. Public Utility Commission (1940) 141 Pa Super Ct 5, 35 PUR(NS) 75, 14 A2d 133, and Id. (1943) 153 Pa Super Ct 475, 51 PUR(NS) 129, 34 A2d 375.

The subject of the second appeal was an order of the Commission made on December 2, 1942, based on a finding of $20,000,000 as the fair value of the company's property, with an addition of $1,566,085 for working capital. The Commission found that the increased rates of the company under its Tariff No. 19 (which had become effective July 1, 1940) were excessive and ordered substantial refunds to consumers for the years 1939 through 1941. By stipulation, the order of the Commission was related to values of the company's property in existence on December 31, 1938. On appeal by the company, questioning the order as confiscatory, we remanded the record for further proceedings. No additional testimony was taken. Instead, the Commission accepted the company's records of new property added to the system, after 1938. It adhered to its findings of all of the indicia of value made in the prior proceeding, and, in arriving at revised reproduction and original costs, it added

as the net cost of the new property incorporated into the system, to its former cost-findings. The result was a finding of $44,064,303, as reproduction cost, depreciated, and $30,589,959 as depreciated original cost of company property in existence on December 31, 1943. Original costs were not trended. The Commission, in the order now before us, adopted $37,333,915 as the fair value of the property, which with an addition for working capital resulted in an approved rate base of $38,900,000. It allowed a return of 6½ per cent on this base. In its order the Commission referred to necessary specific reductions in the domestic, commercial, and industrial rate schedules of the company's Tariff No. 19 and ordered the filing of a new tariff reflecting these reductions. In addition, it directed the company to make reparations to consumers (served during 1942 and 1943 under Tariff No. 19) by repayment to them of a total of $500,000. The reparations have been made and a new tariff, No. 20, filed by the company to comply with the order has reduced the cost of gas to all consumers, as ordered by the Commission. The rates of the new tariff, however, are higher than those in effect prior to July 1, 1940, under Tariff No. 18.

All of the proceedings were instituted by the Commission itself. Consolidated into one inquiry they questioned the propriety of all of the rates of the company under its successive tariffs. When, during the initial proceeding, the company filed its Tariff No. 19, the city immediately entered its protest against the increased rates and on its petition was allowed to intervene. Since October 24, 1939, the city has taken an active part in all of the proceedings before the Commission. The consolidated proceeding resolved itself into a single contested rate case in which the city was an intervening party.

[1–5] Two appeals are before us, both attacking the final order on identical grounds; in effect that the finding of fair value is not supported by the evidence; that the allowed earnings are excessive; and that the present rates of Tariff No. 20 are unreasonable. The city, both as a municipality, and consumer-intervenor had the status of a complainant in the consolidated proceeding. Public Utility Code of May 28, 1937, P.L. 1053, § 1001, 66 PS § 1391. The final order of the Commission, based upon more than 4,000 pages of testimony developed by the city, the company and the Commission, was not administrative merely (Cf. Pittsburgh v. Public Utility Commission [1941] 145 Pa Super Ct 580, 40 PUR(NS) 191, 20 A2d 869) but resulted from the exercise of its quasi judicial functions. Cage v. Public Service Commission (1937) 125 Pa Super Ct 330, 189 Atl 896. The city had an interest in the subject matter and was affected by the final order. As a consumer-complainant, at least, it has the present right of appeal. § 1101 of the Code, 66 PS § 1431. Mrs. Katherine Cassidy, a small consumer, never heretofore a party to the proceeding, clearly, has no standing as an appellant. Her appeal will be quashed.

The city does not have a vested interest in the utility as consumer or otherwise; it and its citizens are entitled to the benefit of the public service supplied by the company but only

at such rates as are fixed by the legislature through the Commission, its administrative agent. Scranton v. Public Service Commission (1923) 80 Pa Super Ct 549. Rate making does not involve the consent, either of a municipality (Suburban Water Co. v. Oakmont, 268 Pa 243, PUR 1920F 810, 110 Atl 778) nor of a consumer. The utility has not questioned the order as confiscatory, and since no constitutional right of the city has been invaded, this appeal does not present the exceptional case in which we may make independent findings of fair value and reasonable rate of return. Ohio Valley Water Co. v. Ben Avon, 253 US 287, 64 L ed 908, PUR1920E 814, 40 S Ct 527; Solar Electric Co. v. Public Utility Commission (1939) 137 Pa Super Ct 325, 31 PUR(NS) 275, 9 A2d 447. And we may set aside the order of the Commission and remand the record but only "for error of law or lack of evidence to support the finding, determination, or order of the Commission . . .": § 1107 of the Code, 66 PS § 1437.

[6–8] Much of the city's criticism of the conclusions and order of the Commission may be attributed to its reluctance to accept the applicable law as laid down by this court. It is unimportant that another gas company in the Pittsburgh area may be serving consumers at rates lower than those approved by the Commission in the present case. What a utility may be entitled to earn is a question to be decided in each particular case and is not governed by an over-all-end judgment of what companies of the same class ought to charge the consuming public for their product. As we have said many times, in determining what the company may charge its customers we must accept fair value of its property used and useful as the basis of rate making under the present Public Utility Code which in § 311 of art. III, 66 PS § 1151 continued the same provision of the prior Public Service Company Law of July 26, 1913, P.L. 1374. The city concedes this, but would have us apply methods of measuring value variously adopted by other courts, some of which reflect social viewpoint rather than an unbiased balancing of the interests of investors and consumers. Specifically, the city stresses the decision in Federal Power Commission v. Hope Nat. Gas Co. (1944) 320 US 591, 88 L ed 333, 51 PUR(NS) 193, 64 S Ct 281, a case which has its point of contact with the present proceeding. It should be enough to say that the decision was concerned with a construction of the Federal Natural Gas Act of June 21, 1938, 52 Stat 821, 15 USCA §§ 717-717w, which directed the Federal Power Commission to fix "just and reasonable" rates without specifying standards for determining them. Any construction of that Act of Congress has no application to the language of our Public Utility Law or its binding effect upon us. We have adhered to the view that when the legislature wrote fair value into the Public Utility Law it adopted the then settled construction of the appellate courts of this state and intended the same meaning of fair value as under the prior Public Service Act. Statutory Construction Act of May 28, 1937, P.L. 1019, 46 PS § 552. Decisions of the Supreme Court of the United States, in other cases, accepting standards

other than fair value in the sense of our statute, do not change the present law of this commonwealth; that remains a question for the legislature, so long as our views are unmodified by a court of higher authority.

Solar Electric Co. v. Public Utility Commission, *supra*, is the present rate-making law of this state. The traditional elements reflecting fair value (Smyth v. Ames [1898] 169 US 466, 42 L ed 819, 18 S Ct 418), and others referred to in the Solar Case, are not of the same weight in every proceeding. If they were, rate making might be reduced to the simple process of applying a formula—a highly desirable but unattainable end. It was our intention in the prior appeal (Peoples Nat. Gas Co. v. Public Utility Commission [1943] 153 Pa Super Ct 475, 51 PUR(NS) 129, 34 A2d 375) not to modify the general principles of the Solar Case, but to apply the law to the facts of this particular proceeding. The opinion in that appeal, except as modified here in one particular, is the law of the case and is binding upon all of us.

[9] Prior to 1920 the company had drilled wells and made other additions to its property at a cost of $7,558,226 but, on its books, had charged these additions to expense of operation. The Commission refused to consider these "expensed items" as additions to property affecting the rate base. In the last appeal we approve these items, depreciated to $4,157,024, as additions to capital investment entering into a finding of fair value. We have reconsidered the question and are now convinced that the Commission was right and that we were wrong. The Commission's finding of depreciated original cost included this total of $4,157,024 charged to operating expense and at least $4,000,000 of that amount was included in depreciated reproduction cost. Elimination of these items from cost findings should reduce the rate base with corresponding benefit to consumers by a downward revision of its present tariff schedules. For this we accept full responsibility. The company had the choice of adding its earnings, over and above actual payment to security holders, to surplus available for future dividends, or to depreciation reserve. Plowing in of depreciation reserve by investment in new property may be considered as additions in computing reproduction and original costs, thus entering into the rate base. Concurring opinion of President Judge Keller in the last appeal, 153 Pa Super Ct at p. 514 et seq. But it is our reconsidered conclusion that where, as here, a part of the earnings, according to the books of the company, were disbursed as operating expense, the company, having recouped the entire cost from the ratepayers, over and above adequate profits paid to security holders, and having enjoyed the benefits of treating the cost as operating expense, cannot later be permitted to say that these expenditures are capital investment on which consumers must pay an additional return. Our conclusion to the contrary in the last appeal was fortified to some extent by the reasoning of Judge Parker in the Hope Case (1943) 47 PUR(NS) 129, 134 F2d 287, in which about $17,000,000 of "expensed property" were involved. The Supreme Court of the United States, reversing in that case, did not find it necessary to determine the status of that

property in relation to the rate base and that question was not decided. But even if it had been, it would not have been binding on us for the reasons above stated. Our change of view rests upon equitable considerations induced by a reconsideration of the Commission's argument in the last appeal and not upon the reversal in the Hope Case. It is probable that, under accounting systems since 1920, the company has not charged any additional capital outlay to expense. If it has, these items also should be deducted from original and reproduction costs. The proceeding will be referred back to the Commission to determine the effect of elimination of "expensed property," upon the rate base.

[10, 11] The record must be remanded for another reason. It is no objection to the final order that it was prompted by negotiations between the company and the Commission looking toward a termination of the proceedings. Since the inquiries were all initiated by the Commission the procedure in terminating them was largely within its control. But the city was not a party to the settlement discussions and the final order must rest upon findings of the Commission from the testimony. The Commission did make and file its findings and it is for us "on appeal, to determine the controverted question presented by the proceeding, and whether proper weight was given to the evidence." Section 1005 of the Code, 66 PS § 1395. There is no complaint as to the finding of depreciated original cost of the company's property as found by the Commission except as to the inclusion of the expensed items. But the rate base cannot be determined solely from that finding because it is conceded, as it must be, that there have been changes in price levels and no adjustments were made by the Commission to reflect price trends disclosing fair value as of the applicable date. Peoples Nat. Gas Co. v. Public Utility Commission, *supra*, 153 Pa Super Ct at p. 484. On the other hand, the rate base cannot rest upon the equivocal finding that the reproduction cost of the company's property was $72,236,739. The finding was made from the testimony of the witness Rhodes, the company's expert, alone, and full acceptance of his testimony by the Commission in its 1942 order can be explained only by the assumption that it did not consider the finding important and intended to ignore it. The decree nisi at that stage of the proceeding disclosed lack of confidence in the judgment of that witness as an estimator of reproduction costs. And the Commission's argument, in the last appeal to us, severely criticized his methods as partisan. The Commission referred to "the egregious estimates of witness Rhodes" and asserted that he "was dedicated to theoretical estimates as against actual costs." In our last opinion we reminded the Commission of the importance of reproduction cost as an essential element in determining fair value for rate purposes, and suggested that the Commission determine the weight of this evidence which it had both accepted and condemned. In the light of our direction, it was the duty of the Commission to appraise the probative force of the testimony of reproduction cost and make a new finding. This it did not do but reaffirmed its prior finding, and it is im-

possible from the order of the Commission now before us to determine the process by which it determined the rate base. In a subsequent order, dismissing the city's petition to reopen the proceeding, it is stated "that the Commission determinations reached in the light of the criticisms [of the company's evidence of reproduction cost] were to a large extent carried into effect in the final Commission order." The place for determining the weight of testimony is in the findings of fact. We agree with the Commission that the testimony is insufficient to support the finding of reproduction cost which it made. The difficulties inherent in appraising reproduction cost testimony does not relieve the Commission from determining its probative weight, bearing in mind that "the burden of proof to show that the rate involved is just and reasonable" is on the public utility. Section 312 of the Code, 66 PS § 1152. It will be for the Commission to reconsider its finding of reproduction cost and, in its discretion, to trend original cost translating it into value as of the date of the determination of the rate base.

In our former opinion we said that a rate of return of 6½ per cent was not unreasonably low; we are not now in position to say that it is unreasonably high as applied to a utility whose sole product is natural gas. The rate should not be reduced merely to compensate for a relatively high finding of fair value.

The ratepayers were not adversely affected in this proceeding, prior to July 1, 1940. That the proceeding must again be referred back to the Commission is unfortunate, but that is not so important as attaining a reasonable final result. The proceeding should be terminated as soon as practicable and we see no compelling reason for determining values subsequent to the date of the last order of the Commission. What further hearings must be held and their scope, will be for the Commission to decide.

The appeal of Mrs. Katherine Cassidy, at No. 94, is quashed.

In the appeal of the city of Pittsburgh, at No. 93, the order is reversed and the record is remitted for further proceedings.

RHODES and ROSS, JJ. dissent.

RHODES, J., dissenting: To remand this case to the Public Utility Commission serves no purpose, and merely delays a proceeding which should have been terminated long ago. The order of the Commission, filed December 7, 1942, 47 PUR(NS) 385, which we reversed in Peoples Nat. Gas. Co. v. Public Utility Commission (1943) 153 Pa Super Ct 475, 51 PUR(NS) 129, 34 A2d 375, was substantially and reasonably correct both on the facts and on the law. But the Commission, in its order of February 16, 1944, 53 PUR(NS) 110, clearly attempted to apply the directives—now conceded by the majority to have been erroneous in part—of this court set forth in its opinion reversing the Commission's order of December 7, 1942, *supra*. The Commission, in making its first order, as stated in the order of February 16, 1944, avoided "the acceptance of original cost, prudent investment, reproduction cost, or other single element, as the rate base," but considered "every element and [gave] it proper weight in the ultimate finding of fair

value." (53 PUR(NS) at p. 111). The last order of the Commission was the result of the application of principles which it realized, and we now acknowledge, were incorrect.

The Commission, in making its order of December 7, 1942, *supra*, was of the opinion that the reproduction cost figures in the record presented by the utility were entirely unreliable and worthless. See order nisi, March 4, 1942 (3531a), 43 PUR(NS) 82; final order, December 7, 1942 (3721a), *supra*. Upon the case being remitted under our decision of November 10, 1943, *supra* (153 Pa Super Ct 475), the Commission thereupon accepted such estimates, which it had thus characterized, and based its order of February 16, 1944, *supra*, thereon. Counsel for the Commission confirmed this fact at the argument of the present appeal at Pittsburgh on April 25, 1945. But the majority opinion still leaves the Commission with no alternative but to repeat the error. It is immaterial that the utility has not questioned the present order as confiscatory; the order is a nullity, and the proceeding is before us in its entirety for an independent judicial determination of findings of fact establishing value. Accordingly, it is my view, in order that no more confusion may be created in the utility law especially as it relates to valuation, we should make our own determination of fair value and express our independent judgment as to both the law and the facts.[1] See Solar Electric Co. v. Public Utility Commission (1939) 137 Pa Super Ct 325, 353, 354, 31 PUR(NS) 275, 9 A2d 447. The utility had claimed that confiscation of its property would result from the enforcement of the Commission's order of December 7, 1942, *supra*. Naturally it does not make such a claim as to the order of February 16, 1944,[2] which is invalid due to our manifest errors with which the Commission sought to comply against its own judgment. But for such an erroneous view of the law given by this court, the Commission would not have reached the con-

[1] "The argument for insisting upon the necessity for an independent judicial determination of findings of fact establishing values can be neatly stated in the form of a syllogism. Rate making is an appropriate exercise of the legislative power provided that the rates are not confiscatory. Whether or not they are confiscatory depends upon the correctness of the finding as to value. The facts relating to value must thus be independently found by a court in order for a court to conclude that a particular legislative act was within the legislative power; otherwise the legislature would itself be finding the facts upon which the very exercise of legislative power depends. It was thus not enough for a court to satisfy itself that the trier of the facts, the administrative, had followed the correct rules as to valuation, Instead, the actual determination of value had to be made by the court": The Administrative Process, James M. Landis, pp. 127, 128. See Ohio Valley Water Co. v. Ben-Avon 253 US 287, 64 L ed 908, PUR1920E 814, 40 S Ct 527.

[2]

Utility's average annual earnings for ten years preceding rate increase (4173a, 4191a) ..	$1,010,206.60
Utility's own estimate of annual earnings in justification of increased rates (2763a)	708,295.04
Annual earnings allowed by commission's original order of December 7, 1942 (3721a) ..	1,401,796.00
Annual earnings allowed by Commission's order of February 16, 1944, after case remanded by this court (4364a)	2,528,500.00

The Commission originally found that the Standard Oil Company was the sole owner of the utility, and that the total invested capital was $12,744,126. (3563a). The Commission did not consider invested capital as being a direct factor in fair value determination, but it did point out that such capital performed a very important function by showing at what point a fair value finding would work a hardship on the utility's owners.

clusion that it did upon this record.

The majority opinion now reverses Peoples Nat. Gas Co. v. Public Utility Commission, *supra* (153 Pa Super Ct 475), as to expensed items in the determination of the rate base. To this extent I concur. My reasons are given in my dissent in *supra,* 153 Pa Super Ct at p. 503, 51 PUR(NS) at p. 151, 34 A2d at p. 391. In 153 Pa Super Ct 475, *supra,* in reversing the Commission for the exclusion of expensed items, this court relied upon Hope Nat. Gas Co. v. Federal Power Commission (1943) 47 PUR(NS) 129, 134 F2d 287, later reversed in Federal Power Commission v. Hope Nat. Gas Co. (1944) 320 US 591, 88 L ed 333, 51 PUR(NS) 193, 64 S Ct 281, and indicated that as long as present fair value is the base capital investment items must be included although charged to expense. In that opinion this court also said (153 Pa Super Ct at p. 486, 51 PUR(NS) at p. 136, 34 A2d at p. 381): "That appellant owns the property and is using it in the service is unquestioned. And, so long as present fair value is the test, it makes no difference whether appellant bought it, received it as a gift, or won it in a lottery." It is significant that the majority opinion now modifies this concept of fair value.

In the majority opinion the principle of "the law of the case" is invoked but not followed. It corrects at least one of the errors in the opinion in the Peoples Case, *supra,* 153 Pa Super Ct 475. I am at a loss to understand upon what principle of law it can be supposed that this court has no power in this case now before us to correct other more material errors. The principle of "the law of the case" has little, if any, application in public utility rate cases. I believe we are free to make a complete, instead of a partial, correction of errors made in our former decision. See Reamer's Estate (1938) 331 Pa 117, 122, 123, 200 Atl 35, 119 ALR 589; 3 Am Jur p. 546, § 990.

The majority opinion, ante, at p. 231, goes on to say: "Solar Electric Co. v. Public Utility Commission, *supra* (137 Pa Super Ct 325, 31 PUR (NS) 275, 9 A2d 447), is the present rate-making law of this state. . . . It was our intention in the prior appeal (People's Nat. Gas Co. v. Public Utility Commission, 153 Pa Super Ct 475, 51 PUR(NS) 129, 34 A2d 375) not to modify the general principles of the Solar Case." In view of such statements in the majority opinion, it is impossible to ascertain the applicable law of this state in determining the fair value of the property of a utility.

I do not agree that Solar Electric Co. v. Public Utility Commission (1939) 137 Pa Super Ct 325, 31 PUR(NS) 275, 9 A2d 447, is the present rate-making law of this state, or the applicable law in determining the fair value of the property of a utility. I think the Solar Electric Company Case, inter alia, has been overruled.

In the Peoples Case, *supra,* 153 Pa Super Ct 475, all of the elements upon which the Commission made its finding of fair value (exclusive of working capital) were eliminated except reproduction cost new less depreciation. The Commission had considered reproduction cost depreciated,

original cost depreciated, book value, and invested capital for a limited purpose (see footnote 2). Under that decision of this court it is obvious that the Commission could not make a finding of fair value based on any elements other than reproduction cost depreciated, or the equivalent—original cost trended. It can readily be seen that the Commission is bound to a formula which requires adherence to one element, to wit, reproduction cost new less depreciation. I think it may be safely asserted that this is in conflict with our statutory law and the pronouncements of this court. In that opinion it is said (153 Pa Super Ct at p. 489, 51 PUR(NS) at p. 138, 34 A2d at p. 382): "Since the legislature put fair value into our law, together with what in 1937, when the law was passed, was universally understood to have been the elements of fair value, that body alone can take it out and substitute something else in its place." Reliance was placed upon McCardle v. Indianapolis Water Co. 272 US 400, 71 L ed 316, PUR 1927A 15, 47 S Ct 144, as establishing reproduction cost as the dominant basis of value. The McCardle Case was decided in 1926. In 1933, Mr. Chief Justice Hughes wrote the opinion in Los Angeles Gas & E. Corp. v. California R. Commission, 289 US 287, 77 L ed 1180, PUR1933C 229, 53 S Ct 637. There is no reasonable ground to intimate or assert that the legislature in 1937 meant fair value to be as indicated in the McCardle Case in 1926 rather than as understood in the Los Angeles Case in 1933. Our present situation is a glaring example of the failure to realistically approach the subject of valuation. To attempt to control the Commission's judgment on a matter of valuation by insisting upon a particular formula is only conducive to chaos in the field of rate making. Valuation, under Smyth v. Ames (1898) 169 US 466, 42 L ed 819, 18 S Ct 418, may be cumbersome and permit consideration of a polyglot of elements, but it at least has afforded an opportunity for a Commission to utilize its judgment without undue restraint. Mr. Justice Harlan, in Smyth v. Ames, *supra,* 169 US at pp. 546, 547, 42 L ed at p. 849, said: "And, in order to ascertain that value [fair value], the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

In Solar Electric Co. v. Public Utility Commission, *supra,* 137 Pa Super Ct at p. 347, 31 PUR(NS) at p. 290, 9 A2d at p. 461, we said: "The supreme court of Pennsylvania and this court have consistently followed the rule of Smyth v. Ames, *supra,* in the valuation of the property of public utilities." See Erie v. Public Service Commission, 278 Pa 512, 521, PUR 1924D 89, 94, 123 Atl 471; Bangor Water Co. v. Public Service Commission (1923) 82 Pa Super Ct. 48. In The Solar Electric Company Case, in

making our own determination of fair value, we said that our "independent judgment" was exercised "after considering the character of respondent's plant, the book cost of invested capital as shown on the company's books, the reproduction cost new and the accrued depreciation."

In view of these pronouncements by our court, determination of fair value, in the manner prescribed in the Peoples Case, *supra,* 153 Pa Super Ct 475, is diametrically contrary to the legal principles recognized as applicable up to that time.

The elements upon which a finding of fair value could be made were enumerated in § 20, Art 5, of the Public Service Company Law of 1913, PL 1374, which reads as follows:

"In ascertaining and determining such fair value, the Commission may determine every fact, matter, or thing which, in its judgment, does or may have any bearing on such value; and may take into consideration among other things, the original cost of construction, particularly with reference to the amount expended in the existing and useful permanent improvements; with such consideration for the amount in market value of its bonds and stocks, the probable earning capacity of the property under particular rates prescribed by statute or ordinance, or other municipal contract, or fixed or proposed by the Commission, and for the items of expenditures for obsolete equipment and construction, as the circumstances and the historical development of the enterprise may warrant; the reproduction costs of the property, based upon the fair average price of materials, property and labor, and the developmental and going concern value of such public service company; and these, and any other elements of value, shall be given such weight by the Commission as may be just and right in each case.

"(b) The Commission shall also have power to make revaluations of the property of any public service company, from time to time, and to ascertain and determine the value of new construction, extensions, and additions to the same."

The act of 1937 did not enumerate the elements to be considered by the Commission in fixing fair value of a utility's property. Section 311, Art. 3, of the act of May 28, 1937, PL 1053, 66 PS § 1151, reads as follows: "The Commission may, after reasonable notice and hearing, ascertain and fix the fair value of the whole or any part of the property of any public utility, in so far as the same is material to the exercise of the jurisdiction of the Commission, and may make revaluations from time to time and ascertain the fair value of all new construction, extensions, and additions to the property of any public utility. When any public utility furnishes more than one of the different types of utility service enumerated in paragraph 17 of § 2 of this act, the Commission shall segregate the property used and useful in furnishing each type of such service, and shall not consider the property of such public utility as a unit in determining the value of the property of such public utility for the purpose of fixing rates."

The term "fair value" in § 311, 66 PS § 1151, and the term "just and reasonable rates" in § 309, 66 PS § 1149, were apparently left undefined by the legislature for a purpose. At

most, reproduction cost is to be considered; it is not the dominant basis of fair value. As the legislature did not define or limit such terms, it could very properly be assumed that the concept of that which is "fair value" and the concept of that which is "just and reasonable" might change from time to time, although this court has taken the position that the act of 1937, in § 311, Art. 3, 66 PS § 1151, continued the provisions of § 20, Art. 5, of the act of 1913.

I think the Commission originally gave as much consideration to the reproduction cost elements as was reasonably warranted under the conditions presented in this case, and we had no substantial ground for reversal. The burden of proof in a rate case is on the utility. "What the Commission may see fit to ask for is one thing, but what a utility must produce in order to sustain its burden of proof in a rate case is a different matter." Peoples Nat. Gas Co. v. Public Utility Commission (1940) 141 Pa Super Ct 5, 15, 35 PUR(NS) 75, 14 A2d 133, 137. The Commission made a finding of reproduction cost, but it pointed out that this finding was on unreliable evidence. The weight therefore to be given to such finding was to be determined by the facts in this case. The basis of calculation of fair value, in the order of February 16, 1944, 53 PUR(NS) 110, as admitted by Commission's counsel at the argument at Pittsburgh, is the discredited testimony as to reproduction cost. It is true that the United States Supreme Court, in McCardle v. Indianapolis Water Co. 272 US 400, 71 L ed 316, PUR1927A 15, 47 S Ct 144, places great emphasis on reproduction cost. It reiterated this doctrine in St. Louis & O'Fallon R. Co. v. United States, 279 US 461, 73 L ed 798, PUR1929C 161, 49 S Ct 384, but prior to the enactment by the Pennsylvania legislature of the Public Utility Law of 1937 there was a considerable change in attitude on the part of the United States Supreme Court as to those theories which we have adopted without any consideration of subsequent modification by that court. In 1933, in Los Angeles Gas & E. Corp. v. California R. Commission, 289 US 287, 77 L ed 1180, 1193, PUR1933C 229, 241, 53 S Ct 637, 644, Mr. Chief Justice Hughes said: "The actual cost of the property—the investment the owners have made—is a relevant fact. Smyth v. Ames (1898) 169 US 466, 547, 42 L ed 819, [849], 18 S Ct 418." In that case the court found that while the California Commission had based its rates principally upon investment costs, it had done so largely because evidence as to reproduction cost was unreliable; and that on the whole the California Commission had given as much consideration to the reproduction cost factor as was warranted under the circumstances. Mr. Chief Justice Hughes, in his opinion, also pointed out that both actual cost and reproduction cost were relevant facts, but that neither was the final and exclusive test; and that the weight to be given to either of them was to be determined by the facts of the particular case.

In 1942, in Federal Power Commission v. Natural Gas Pipeline Co. 315 US 575, 86 L ed 1037, 1049, 1050, 42 PUR(NS) 129, 138, 62 S Ct 736, 743, the United States Supreme Court went on to say: "The

Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped."

Federal Power Commission v. Hope Nat. Gas Co. 320 US 591, 88 L ed 333, 345, 51 PUR(NS) 193, 200, 64 S Ct 281, 288, was decided on January 3, 1944, wherein it was said: "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the act[3] is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

In the field of rate making, we have been largely guided by the decisions of the United States Supreme Court, and have necessarily relied upon the views of that court as to the constitutional requirements. In Bangor Water Co. v. Public Service Commission, *supra* (82 Pa Super Ct 48, 55), this court, in an opinion by the late President Judge Keller, said: "The decisions of the Supreme Court of the United States require us to base the fair return upon its present value; that is, its reasonable value at the time it is being used for the public."

"It is impossible," the majority opinion states, ante, p. 232, "from the order of the Commission now before us to determine the process by which it determined the rate base." On the contrary, the order has no other basis to support its validity than the worthless testimony of the utility's witness as to reproduction cost. The standard furnished by the majority opinion for the future guidance of the Commission is of such a nature as to be impossible of practical application except in so far as the Commission is obliged to accept the utility's evidence as to depreciated reproduction cost in the determination of fair value and in fixing a rate base.

A pertinent inquiry would be: Where do we stand on utility valuation as a result of the Peoples Case (1943) 153 Pa Super Ct 475, 51 PUR(NS) 129, 34 A2d 375, and Philadelphia Transp. Co. v. Public Utility Commission (1944) 155 Pa Super Ct 9, 55 PUR(NS) 473, 37 A2d 138, and the majority opinion in the present case? In the Philadelphia Transportation Company Case this court said (155 Pa Super Ct at p. 21, 55 PUR(NS) at p. 480, 37 A 2d at p. 144): "This finding [of original cost] is ineffective in deter-

[3] The Federal Natural Gas Act of 1938 and the Pennsylvania Public Utility Law of 1937 are similar in some respects.

mining value for the reason that the costs were not trended to reflect current prices of labor and materials on that date." In the same case we also said (155 Pa Super Ct at p. 22, 55 PUR(NS) at p. 481): "In the absence of adjustments of original or historical costs to determine present fair value as of the date in question the finding of the Commission [as to original cost] is entitled to little consideration as a determining element."

In the Peoples Case, *supra* (153 Pa Super Ct at p. 484), this court said that unless there has been no great change in cost levels, or there has been a change but proper adjustment made based upon competent evidence of price trends, original cost is irrelevant to rate base determination. Now we again say—original cost must be trended. Such pronouncements are judicial legislation, and are in conflict with our own statements and with the statutory law which we have recognized. If any such qualification of original cost as an element of fair value exists, it is not to be found in any statute or legislative enactment; and no acceptable reason has been even suggested in support of the validity of such judicial amendment. In the Peoples Case, *supra* (153 Pa Super Ct at pp. 482, 488, 51 PUR (NS) at p. 138, 34 A2d at p. 379, we said "the legislative mandate in this commonwealth is that the rate base is fair value," and that "our legislature adopted the Public Utility Law of 1937 and wrote 'fair value' into § 311, 66 PS § 1151, and that standard, minus a detailed list of the elements constituting fair value, was carried over from the Public Service Act of 1913." In order to retain a proper perspective, it is to be noted that five months later, in the Philadelphia Transportation Company Case, we refused to be bound by these declarations, and rejected the fair value elements which did not suit us notwithstanding the plain words of the statute which we had held controlling but did not follow.

I have previously quoted § 20, Art 5, of the Public Service Company Law of 1913. In construing that section we have said it was mandatory to consider all of the elements enumerated in the section. We said in Beaver Valley Water Co. v. Public Service Commission (1921) 76 Pa Super Ct 255, 259: "The Public Service Company Law (Art V, § 20a), directs that in ascertaining and determining the fair value of a public service company's property it may (shall) take into consideration among other things (1) the original cost of construction; (2) the amount in market value of its bonds and stocks; (3) the probable earning capacity under the rates fixed by the Commission; (4) expenditures for obsolete equipment and construction,—(as warranted, in connection with (2), (3), and (4), by the circumstances and historical development of the enterprise)—; (5) reproduction cost of the property, based upon the fair average price of materials, property and labor; (6) developmental and going concern value —all of which, together with any other elements of value, are to be given such weight as may be just and right in each case." See, also, Bangor Water Co. v. Public Service Commission, *supra*, 82 Pa Super Ct at p. 52.

Nevertheless, in the Peoples Case (153 Pa Super Ct 475), and in the

Philadelphia Transportation Company Case, *supra*, and again in the present majority opinion, this court has ruled out original cost of construction unless the items are trended, and by elimination nothing is left upon which a rate base can be predicated by the Commission except reproduction cost new less depreciation. The result is palpably wrong, and the power to fix fair value passes largely to the utility. As the first specific element of fair value, original cost is mentioned both in the act of 1913 and in our opinion in the Beaver Valley Water Company Case, *supra*, without any limitation or suggestion that consideration of this element shall depend either upon the persistence of price levels or the application of trends. The same is true of Smyth v. Ames, *supra*. To the contrary actual invested capital has always been considered in Pennsylvania as one of the relevant valuation factors. See Highspire Water Co. v. Public Service Commission (1921) 76 Pa Super Ct 504; Lewistown v. Public Service Commission (1923) 80 Pa Super Ct 528; New Street Bridge Co. v. Public Service Commission, 271 Pa 19, 38, PUR 1922A 404, 114 Atl 378.

In the Solar Electric Company Case (1939) 137 Pa Super Ct 325, 31 PUR(NS) 275, 9 A2d 447, in making our own determination of fair value, we considered book cost of investments, and therefore the Commission should not be prohibited from doing likewise. Rate making should be a simple process rather than a tangled and mystic affair. The administrative agency should have freedom of action under equitable principles. Original cost less depreciation is a ready and equitable element for making a finding of fair value and for ultimate fixing of rates; likewise the straight-line or age-life method is proper for determining the amount of depreciation to be deducted from the cost of the plant.

Adding to the confusion is our statement in the Philadelphia Transportation Company Case, *supra*, that the market value of securities as one of the elements to be considered in finding fair value should have been disregarded by the Commission. This holding is in conflict with the statutory mandates as interpreted by us in other cases, as well as with the rules of law previously laid down by this court with respect to the factors to be considered in arriving at a fair value determination. In Solar Electric Company Case, *supra*, we said that we followed Smyth v. Ames, *supra*, and that the elements to be considered by the Commission in ascertaining and determining fair value were those enumerated in § 20, Art. 5, of the Public Service Company Law of 1913, PL 1374, and we went on to say (137 Pa Super Ct at p. 336, 31 PUR(NS) at p. 284, 9 A2d at p. 457): "While the new act (Public Utility Law) does not go into details as to the items which should be considered by the Commission in fixing the fair value of a utility's property, as fully as the old act (Public Service Company Law) did, this was not because of any intention to change the law in this respect, but because the decisions of the United States Supreme Court and of our Supreme Court had definitely settled the principles to be applied by the Commission in arriving at such fair value, and they did not require elaboration

in the statute." Section 20, Art. 5, of the Public Service Company Law of 1913, and Smyth v. Ames, *supra*, recognized market value of bonds and stocks as one of the relevant elements to be considered by the Commission in determining fair value.

We have thus, so far as the state of Pennsylvania is concerned, neither consistency nor continuity of the utility law.

I think a solution of this case might be for us to accept the Commission's original finding of fair value, including working capital, of $21,566,085, and accept the alleged additions to the utility's property since 1938, in the net amount of $4,334,096, providing it is stipulated that this amount represents capital investment and not expensed items. We would thus have a rate base of $25,900,181, with an allowable return of 6½ per cent. This would be adequate for all purposes, and would represent fair value determined in accordance with the law.

Ross, J., joins in this dissent.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES

William B. Rodman and/or Peerless Market

v.

New England Telephone & Telegraph Company

D.P.U. 7322
November 20, 1945

PETITION *for restoration of telephone service denied at request of police official; dismissed.*

Service, § 62 — Jurisdiction of Department — Restoration order — Refusal by telephone company.

1. The jurisdiction of the Department to order restoration of telephone service, although broad, is not unlimited, and it has a duty to order restoration only if the refusal of the company to do so is unjust and unreasonable, p. 243.

Service, § 117 — Right of telephone patron to receive — Public considerations.

2. The right of an individual to telephone service is not absolute, and it must yield to the greater considerations of law and order and other similar compelling considerations involving the public welfare, p. 243.

Service, § 134 — Grounds for denial — Police request — Telephones — Premises used for gambling.

3. A telephone company is justified in discontinuing service at the request

of a police commissioner on the ground stated by the police commissioner that there is reasonable cause to believe that the telephone is being used for gaming purposes on premises used for the placing of bets on horse racing and numbers, although there is no evidence of the use of the telephone for any illegal purpose; service denial under such circumstances is neither unjust nor unreasonable, and disregard for the police request might subject the company to prosecution for participating in an illegal enterprise, p. 243.

APPEARANCES: Charles I. Taylor, for the petitioner; T. Baxter Milne, General Counsel, for the New England Telephone and Telegraph Company; Andrew J. Gorey, Secretary to the Police Commissioner, for the Police Department of the City of Boston.

By the DEPARTMENT: This is a petition by William B. Rodman for restoration by the New England Telephone & Telegraph Company of telephone service which was discontinued by the company on August 2, 1945, at the request of the police commissioner of the city of Boston.

The telephone is described as Columbia 3520. It was installed on the application of the petitioner, William B. Rodman, previous to 1925 at 1367 Dorchester avenue and in 1932 was removed at his request to 207 Adams street, Dorchester, where it remained until its removal in August, 1945. There were additional listings in the name of Peerless Market and Bill's Market. That market, variously described, is carried on in the form of a co-partnership in which the petitioner William B. Rodman has a 50 per cent interest and the remaining interest is shared by his brother Samuel Rodman and his brother-in-law Simeon Golong. A considerable market business has been carried on by the partners at the place of business, 207 Adams street, Dorchester, for a number of years.

On August 1, 1945, the telephone company received a letter from the police commissioner requesting the discontinuance of the telephone service because the police had reasonable grounds to believe that the service was being used for an illegal purpose. On August 2, 1945, the company discontinued the service in accordance with the police commissioner's request. The company on the same day notified this Department of its action and sent to it a copy of the letter which it had received from the police commissioner.

The action of the telephone company in discontinuing service was in accordance with an arrangement made by the company with the police commissioner in November, 1942, at the latter's request. It is an arrangement which the telephone company has felt obliged to make as a public duty so as to assist the law enforcement authorities in the prevention of crime.

[1–3] Evidence was presented at the public hearing before this Department on September 20, 1945, which required a finding that the premises at 207 Adams street, Dorchester, were used by the petitioner for the placing of bets on horse racing and numbers. On July 30, 1945, the police found on the premises slips relating to bets on horse racing and

numbers. Rodman was arrested on the same day and arraigned and convicted in the Dorchester district court for that offense. He accepted a finding of guilty and paid a fine of $100. In 1939 he was convicted on a charge of registering bets and promoting a lottery in the same court, was fined $50 on each case and paid the fines.

There was no evidence presented at the hearing before us of even a single use of the telephone for any illegal purpose, and if it is to be found that the telephone was so used such a finding would have to be based on an inference to be drawn from general knowledge that telephones are customarily used for these purposes in establishments where illegalities of this kind are practiced. See Commonwealth v. Jensky (1945) — Mass —, 61 NE2d 532.

For the purposes of this case we do not find it necessary to decide whether the telephone was used for the placing of bets on horse races or numbers for our decision rests on a different consideration. We conceive it to be our duty to order the telephone company to restore service to Rodman only if the refusal of the company to do so is unjust and unreasonable. General Laws, Chap 159, § 16. The statute confers on this Department jurisdiction to receive and hear the petition. The jurisdiction conferred on the Department is in very broad terms, but it is not unlimited. For instance, it has been held that to order the telephone company to render service which would affect interstate commerce lies beyond our jurisdiction. New England Teleph. & Teleg. Co. v. Department of Public Utilities, 262 Mass 137, 151, PUR1928B 396, 159 NE 743, 56 ALR 784.

That case (262 Mass at p. 148, PUR1928B at p. 406) is also authority for the legal proposition that this Department cannot exercise its jurisdiction so as to unreasonably interfere with the rights of property of the telephone company nor with its right of management "beyond the reasonable limit of public control."

There is an obvious limitation on our power to act in this case. The right of an individual to telephone service is not absolute. It must yield to the greater considerations of law and order and other similar compelling considerations involving the public welfare. These considerations at once limit the right of an individual to receive, and qualify and modify the duty of the telephone company to furnish service.

The telephone company was justified in discontinuing the service of the petitioner at the request of the police commissioner on the ground stated by the police commissioner that there was reasonable cause to believe that the telephone, Columbia 3520, at 207 Adams street, Dorchester, was being used for gaming purposes. The police commissioner of Boston is a public officer charged with the vital responsibility for maintaining law and order and the prevention of crime in the city of Boston. As the responsible head of the police department his official acts are entitled to the greatest weight. "Where no law has been violated, and no statute has made good faith essential to valid action, acts of administrative officers cannot be attacked in judicial proceedings on the ground that in fact those officers

were not governed by the highest standards of impartial and unselfish performance of public duty." Gibney v. Mayor of Fall River (1940) 306 Mass 561, 566, 29 NE2d 133.

This Department possesses no jurisdiction over the acts of the police commissioner of the city of Boston in the performance of his duty nor the right to review his actions. Our jurisdiction applies only to the telephone company. If a person is aggrieved by his official acts, such person must seek a remedy in the courts and not from this Department. Unless and until the courts shall decide that the action of the police commissioner in requesting the telephone company to discontinue the service to the petitioner is unwarranted and baseless, we feel bound to consider that a request, such as was made to the telephone company in this case, is a necessary incident in the prevention of crime and the maintenance of law and order equally binding upon this Department as upon the telephone company and as controlling in determining that the telephone company has acted justly and reasonably in refusing to furnish telephone service after receiving such a request.

Our decision to be bound by the action of the police commissioner of the city of Boston in requesting the discontinuance of service to the petitioner is not to be regarded, even inferentially, as meaning that this Department would refuse to review the action of the telephone company discontinuing service to a subscriber or refusing service to an applicant because the telephone company of its own accord felt that the instrument would be used or was being used for illegal purposes. Quite the contrary is the case. If the telephone company of its own accord should take such action, this Department would review the action of the company and determine for itself whether or not the company were acting unjustly and unreasonably.

As to the case before us, it must be observed that Chap 159, § 16 requires us to act in behalf of the petitioner seeking the restoration of service only when the telephone company unjustly and unreasonably refuses to furnish it. The telephone company has been neither unjust nor unreasonable in discontinuing the service to the petitioner and in refusing to restore it.

It is appropriate to consider the position of the telephone company in this case. Were the company to disregard the request of the police commissioner, it might well find itself subject to prosecution for participating in an illegal enterprise. A power company was fined substantially for furnishing gas to illicit stills. United States v. Consumers Power Co. (Jan. 29, 1940 US Dist Ct E.D. Mich).

In that case the court observed "Any public utility corporation has legal right to refuse service if there is reason to believe that the service may be used for unlawful purposes."

It has been urged in the petitioner's behalf that, even though a serious offense was committed, the petitioner should not therefore indefinitely be deprived of telephone service. As to this contention, it is necessary to observe that no evidence of repentance on the petitioner's part has been adduced. On the contrary, he had demonstrated a total lack of repentance. He was convicted for the same kind of offenses in 1939 as in 1945, so that, so

far as the evidence points to a reasonable conclusion, the lapse of six years did not suffice to effect a change in the petitioner's willingness to commit crime. The contention may, therefore, be summarily dismissed on the ground that the evidence discloses that the present is not the time for the petitioner to urge it. The first prerequisite to the restoration of telephone service incumbent on the petitioner is to satisfy the police commissioner that he has in fact mended his ways.

A number of cases have been called to our attention where the telephone company has been sustained under similar circumstances in refusing to furnish telephone service as a deterrent to crime. See Kronenberg v. Southern Bell Teleph. & Teleg. Co. (US Dist Ct W.D. La 1940) 36 PUR (NS) 513.

In Ganek v. New Jersey Bell Teleph. Co. (1944) 57 PUR(NS) 146, 149, the New Jersey Board of Public Utility Commissioners held that the telephone company could protect itself and refuse service so long as it had reasonable grounds for its belief that the telephone was to be used for illegal purposes and that the company's position in refusing service was supported by the refusal of the city police to concur in the reëstablishment of service based on the general knowledge of the petitioner's past history and police record. This case is particularly pertinent to the case before us for decision as it appeared that the complainant while convicted on a charge of placing bets on horses was not shown to have used the telephone for such purposes. As to that point the Board held that, if the telephone company "had reasonable cause for believing that its facilities were being used or will be used in furtherance of such illegal purposes," the company was justified in invoking its regulations against the complainant.

In People ex rel. Restmeyer v. New York Teleph. Co. (1916) 173 App Div 132–134, 159 NY Supp 369, it was held that a telephone company cannot be required to furnish services for illegal purposes such as the receiving or registering of bets on horse racing. In that case there was evidence that the telephone itself was being used in connection with registering bets, but the following observations of the court are particularly appropriate: " . . . In view of these facts the police were justified in regarding the relator's place as an unlawful resort, and their request to the telephone company to discontinue the telephone service therein was entirely proper and in the interest of law and order. It is certainly not an unlawful or oppressive use of police power to interrupt telephone service by arrangement between the police and the telephone company in a case where the telephone is being used, as it was in this case, to carry on a criminal business. Speaking generally, the telephone company is bound to furnish service to all who pay its proper charges and obey its reasonable regulations, but it is not required to furnish such service to those who are reasonably sure to use it for an illegal purpose.

" . . . In short, the fact which stands out most prominently in this record is the relator's disposition to violate this particular law, unmitigat-

ed by repentance or promises of reform on his part.

"We think the telephone company was well within its right in refusing to furnish its telephone service to this relator in view of his former and recent illegal use of the telephone, and that the writ, in the exercise of a sound discretion, should not have been issued."

In People ex rel. Hiegel v. New York Teleph. Co. 119 Misc 61, PUR 1923A 463, 464, 195 NY Supp 332, it was held that the telephone company should not be compelled to furnish service which had been discontinued at the request of the police on account of the use of the switchboard for the receipt of gambling information. The following language was used by the court: "The respondent, speaking generally, is under a duty as a public service corporation to furnish service to members of the public; but this duty is not absolute, and does not imply a right to its enforcement by peremptory mandamus under all circumstances. . . . It is subject to reasonable limitations, especially in the interest of public order and welfare. The respondent has established a rule or practice of refusing telephone service at the request of the police department, where a criminal charge has been made in connection with the use of such service at the same premises. A refusal of service upon this ground, coupled with evidence that the charge is not made arbitrarily or on mere suspicion, but in good faith and on probable cause, has been consistently held to be a sufficient answer to an application for a peremptory mandamus. . . ."

In Fogarty v. Southern Bell Teleph. & Teleg. Co. (1940) 35 PUR(NS) 296, 34 F Supp 251, the telephone company was held to be justified in discontinuing service to one whom it believed to be using its facilities to gather and disseminate racing news in violation of state laws. And it was also held that it could consider a warning received from the United States Attorney General's office that it would be made to face criminal proceedings if the service were not discontinued.

In Hagerty v. Southern Bell Teleph. & Teleg. Co. (1940) 145 Fla 51, 37 PUR(NS) 29, 199 So 570, it was held that the telephone company presents a good and legal defense in an injunction suit when it alleges that Federal and state attorney generals have advised the company that its facilities are being used to promote lottery schemes, gambling, and the like, and requesting that service be discontinued.

In Hamilton v. Western U. Teleg. Co. (1940) 36 PUR(NS) 38, 40, 34 F Supp 928, the court refused to enjoin the company to furnish service and observed:

"If there is justification for the defendant's belief that the information transmitted to the plaintiff over its wires is being used for an illegal purpose, a court of equity will not restrain the defendant from discontinuing such service. The tariffs published by the defendant contain a provision preventing lessees of its wires from using its service to violate directly or indirectly, any Federal or state law. Even without such provision in the tariffs, the defendant would not only be authorized, it would be obligated, to discontinue service which contributes to and facilitates the operation

of a business or enterprise in violation of law. Any person or company that knowingly assists in a scheme to violate the law is subject to prosecution. A court of equity will not restrain the discontinuance of service by a utility if the character of the use of the service is such as to justify an honest doubt as to its legality. The service which a person has the right to demand of a public utility is service lawful in character."

In Cullen v. Ohio Bell Teleph. Co. (Ohio Com Pleas Ct 1940) 36 PUR (NS) 152, 157, the United States District Attorney objected to the continuance of telephone service to the plaintiff on the ground that such service was being used unlawfully in the furtherance of gambling operations. In compliance with such notice the telephone company proposed to discontinue the service as a consequence of which a suit was brought to enjoin the proposed discontinuance. The court said:

"We do, however, agree with the contention of the plaintiff that the telephone company is not the censor of public or private morals and that the telephone company is not justified in discontinuing the service because it is being threatened with prosecution for furnishing such telephone facilities. We believe we are taking a broader view of this matter when we say that a public utility should not be required to furnish its facilities and service to a party who apparently makes illegal use thereof or such use that tends to produce illegal results of the use. The court further wishes to point out that while the case is not controlling upon this court, that the district court of the United States for the northern district of Ohio eastern division, in the case of Hamilton v. Western U. Teleg. Co. (1940) 36 PUR(NS) 38, 34 F Supp 928, did dissolve the preliminary injunction issued in that case upon a similar set of facts." The court further said: "In these times facilities of public utilities, especially those engaged in furnishing the means of communication should by all means remain open and available for use. It is equally important that the use of these facilities should not be tinged in the slightest degree with any transaction about which there is the slightest question of legality."

In Tracy v. Southern Bell Teleph. & Teleg. Co. (1940) 38 PUR(NS) 527, 37 F Supp 829, it appears that the attorney general of Florida notified the telephone company that the plaintiffs were using the telephone facilities for illegal gambling purposes and requested the discontinuance of the plaintiff's telephone service. The company notified the plaintiff of its intention to discontinue and a suit was thereupon brought unsuccessfully against the company. The court held "Although telephone companies, as public utilities, are required to furnish their facilities to the public indiscriminatively so long as such facilities are used for lawful purposes, it is well settled that a telephone company may refuse, and cannot be compelled, to furnish service which will be used, or which the telephone company has reasonable cause to believe will be used, in furtherance of illegal enterprises. No one can be compelled to aid in an unlawful undertaking. The procuring and placing of wagers on horse races in the manner followed by the

plaintiffs is unlawful in Florida. Plaintiffs cannot invoke the processes of a court of equity to restrain defendants from discontinuing a public service which the telephone company had probable cause or reasonable grounds to believe is being used in the maintenance and conduct of such illegal or immoral enterprise."

See also Howard Sports Daily v. Weller (1941) 179 Md 355, 38 PUR (NS) 197, 18 A2d 210; Plotnick v. Public Utility Commission (1941) 143 Pa Super Ct 550, 39 PUR(NS) 423, 18 A2d 542; Re Manfredonio (1944) 183 Misc 770, 58 PUR(NS) 32, 52 NY Supp 2d 392.

These precedents combine to form an impressive weight of authority in support of the action of the New England Telephone & Telegraph Company in refusing to restore the service to the petitioner. In our judgment they support our conclusions that the telephone company has acted neither unjustly nor unreasonably.

Accordingly, after public hearing, of which due notice was given, and consideration, it is

Ordered: That the above-entitled petition be and hereby is dismissed.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES

David Carrozza

v.

New England Telephone & Telegraph Company

D.P.U. 7323
November 23, 1945

PETITION *for restoration of telephone service denied at request of police official; dismissed.*

Service, § 62 — Jurisdiction of Department — Restoration order — Unreasonable refusal by telephone company.

1. The jurisdiction of the Department to order restoration of telephone service, although broad, is not unlimited, and it has a duty to order restoration only if the refusal of the company to do so is unjust and unreasonable, p. 252.

Service, § 117 — Right of telephone patron to receive — Public considerations.

2. The right of an individual to telephone service is not absolute, and it must yield to the greater considerations of law and order and other similar controlling considerations involving the public welfare, p. 252.

Service, § 134 — Grounds for denial — Police request — Telephones — Use for gambling.

3. A telephone company is justified in discontinuing service at the request of a police commissioner on the ground stated by such official that the police knew that the telephone was being used for gaming purposes on premises where a police investigation showed that illegal betting on horse racing was being conducted, p. 252.

APPEARANCES: George T. Lanigan, for the petitioner; T. Baxter Milne, Attorney, for New England Telephone and Telegraph Company; Andrew J. Gorey, for the Police Department (by petition to intervene).

By the DEPARTMENT: This is a petition by David Carrozza for restoration by the New England Telephone and Telegraph Company of telephone service which was discontinued by the company on June 14, 1945, at the request of the police commissioner of the city of Boston.

The telephone is described as "East Boston 3207." It was installed on the application of the petitioner, David Carrozza, on November 14, 1944, and was removed by reason of a fire April 21, 1945; reinstalled on May 25, 1945, and finally removed at the order of the police commissioner as stated above. The class of service which the petitioner had was known as "semi-public" and was installed in the place of business of the petitioner, which was operated as a pool parlor, known as the Legion Poolroom, 25 Maverick Square, East Boston. At the time the phone was removed, the business was being carried on by the petitioner's son, Elio Carrozza.

On June 13, 1945, the telephone company received the following letter from the police commissioner requesting the discontinuance of the telephone service: "Deputy Superintendent James T. Sheehan reports that the telephone, number EASt Boston 3207, located in the Legion Pool Room at 25 Maverick Square, East Boston, Pool Room License #14, in the name of David Carrozza, is used in registering bets. The modus operandi is as follows: 'bets are written on a tile shelf in pencil and immediately called out to a place where the bet is tabulated, and then the pencil markings are washed off the tile with Dutch Cleanser and water.'

"Inasmuch as the officers know that the telephone is being used for the registration of bets, coupled with the fact that they have made every effort to obtain evidence that would warrant an arrest, Deputy Sheehan recommends that the telephone be removed. Therefore, you are requested to remove the telephone EASt Boston 3207, located in the Legion Pool Room at 25 Maverick Square, East Boston."

The action of the telephone company in discontinuing service was in accordance with an arrangement made by the company with the police commissioner in November, 1942, at the latter's request. It is an arrangement which the telephone company has felt obliged to make as a public duty so as to assist the law enforcement authorities in the prevention of crime.

Evidence was presented at the public hearing before this Department on

September 20, 1945, which required a finding that the premises at 25 Maverick Square, East Boston, were used by the petitioner for the placing of bets on horse racing. Police Officer Edward F. Blake, of the Boston police department testified that he was an officer attached to the office of the inspector of divisions and that he had been at the petitioner's place of business many times and had been observing the premises since the latter part of December, 1944, and in connection with his duties he had observed the premises on the average of once every two weeks until June of 1945. He stated that the premises led off the street at 25 Maverick street and consists of a long narrow room. At the front of the premises is a window which gives a view of the whole interior of the pool room. In the center of the floor, down toward the rear, there are three pool tables, one after the other. At the extreme end of the pool room there is a small counter, about waist high, built of wood; on the counter is a cash register; behind the counter and fastened to the wall is a pay station telephone—not in a booth—just attached to the wall; directly underneath this telephone is a small shelf covered with title board, such as you use in a kitchen wall. He stated that on his observations of this place and inspection of the premises behind this counter he would find on each occasion a can of Dutch Cleanser and a moist rag on top of the tile board. He further stated that when he entered the premises—and he was usually accompanied by other officers on these occasions—Mr. Elio Carrozza was behind the counter and with him on most occasions was one Frank N. Maddalone of 229 Maverick street, East Boston, a party whom he stated had been convicted for booking horses in Maverick Square. On one occasion when he entered and went behind the counter he observed a buzzer fastened to the wall behind the counter. The wiring was new. He traced the wiring back to the front door and found a concealed push button under a little seat built over the radiator situated near the front door. By pressing the push button the buzzer would ring behind the counter. He stated on one occasion when he entered the premises he found Mr. Carrozza and Maddalone on the premises behind the counter. He found a crowd of men standing around the counter, and as he entered the crowd broke up and went in different directions. Behind the counter the police found racing sheets and racing information, some of which were marked in pencil quoting the horses that won in the number of races that had been run up to that time. On another occasion that the police visited the pool room, both Mr. Carrozza and Maddalone were on the premises, and Maddalone was at the time using the telephone. When the police entered, he looked up and hung up the receiver. On another occasion the witness saw Maddalone take a wet cloth and Dutch Cleanser and scrub the top of the tile board. In the opinion of the police the purpose of the buzzer was to warn the people behind the counter of the approach of law enforcement officers, thereby giving them opportunity to scrub the written play from the surface of the tile board.

The telephone company introduced

in evidence the collection record of EASt Boston 3207, which clearly indicates that the amount deposited for local messages fell off sharply when the racing season was terminated.

[1–3] Although the Department is well warranted in finding that the telephone on the petitioner's premises was being used in connection with an illegal enterprise, we do not find, for the purposes of this case, that it is necessary to decide whether the telephone was being used for the placing of bets on horse races, for our decision rests on a different consideration. We conceive it to be our duty to order the telephone company to restore service to Carrozza only if the refusal of the company to do so is unjust and unreasonable. General Laws, Chap 159, § 16 (Ter Ed). The statute confers on this Department jurisdiction to receive and hear the petition. The jurisdiction conferred on the Department is in very broad terms, but it is not unlimited. New England Teleph. & Teleg. Co. v. Department of Public Utilities, 262 Mass 137, 151, PUR1928B 396, 159 NE 743, 56 ALR 784.

There is an obvious limitation on our power to act in this case. The right of an individual to telephone service is not absolute. It must yield to the greater considerations of law and order and other similar considerations involving the public welfare. These considerations at once limit the right of an individual to receive, and qualify and modify the duty of a telephone company to furnish service.

The telephone company was justified in discontinuing the service of the petitioner at the request of the police commissioner on the ground stated by the police commissioner, that the police knew that the telephone was being used for gaming purposes. The police commissioner of Boston is a public officer charged with the vital responsibility for maintaining law and order and the prevention of crime in the city of Boston. As the responsible head of the police department, his official acts are entitled to the greatest weight.

"Where no law has been violated, and no statute has made good faith essential to valid action, acts of administrative officers cannot be attacked in judicial proceedings on the ground that in fact those officers were not governed by the highest standards of impartial and unselfish performance of public duty." Gibney v. Mayor of Fall River (1940) 306 Mass 561, 566, 29 NE2d 133.

Our reasons are fully set forth in DPU 7322 (1945) 61 PUR(NS) ante, p. 242, and apply equally in this case, in the petition of William B. Rodman and/or Peerless Market for restoration by the New England Telephone and Telegraph Company of telephone service, and it is not necessary to repeat all of those reasons here, except to make the following observation. This Department possesses no jurisdiction over the acts of the police commissioner of the city of Boston in the performance of his duty, nor the right to review his actions. Our jurisdiction applies only to the telephone company. If a person is aggrieved by his official acts, such a person must seek a remedy in the courts and not from this Department. Unless and until the courts shall decide that the action of the police commissioner in requesting the telephone company to

discontinue the service to the petitioner is unwarranted, baseless and arbitrary, we feel bound to consider that a request such as was made to the telephone company in this case is a necessary incident in the prevention of crime and the maintenance of law and order, equally binding upon this Department as upon the telephone company and as controlling in determining that the telephone company has acted justly and reasonably in refusing to furnish telephone service after receiving such a request.

Accordingly, after public hearing, of which due notice was given, and consideration, it is

Ordered, that the above-entitled petion be and hereby is dismissed.

NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

Staten Island Edison Corporation

v.

New York City Housing Authority et al.

— App Div —, 58 NY Supp2d 427
November 19, 1945

APPEAL *from order denying motion of electric company for judgment on the pleadings and directing entry of judgment dismissing complaint in action against municipal housing authority; affirmed. For decision below, see (1944) 184 Misc 564, 58 PUR(NS) 40, 52 NY Supp2d 639.*

Discrimination, § 59.1 — Rate concessions — Municipal housing authority — Public benefits.

1. The test of whether a public housing authority is entitled to electric service under the rate for public buildings is whether the purpose of the use is in furtherance of a public benefit, p. 254.

Discrimination, § 59.1 — Rate concessions — Municipal housing authority — Public benefits.

2. A municipal housing project, operated for the purpose of safeguarding the entire public from the menace of slums, is entitled to rates for electric service applicable to public buildings, since the purpose is a public benefit and the buildings are devoted to its accomplishment and are public buildings, p. 254.

Before Close, P.J., and Carswell, Johnston, Adel, and Lewis, JJ.

APPEARANCES: George Foster, Jr., of New York city (Edmund B. Naylon, of New York City, on the brief), for appellant; Andrew Bellanco, of

New York city (Ignatius M. Wilkinson, Corporation Counsel, and Francis J. Bloustein, both of New York city, on the brief), for respondent.

Memorandum by the COURT:

[1, 2] Action for a declaratory judgment that the defendants are not entitled to the "public building" rate for electric energy furnished to a housing project in Staten Island and for a money judgment for the difference between the "public building" rate and the "general service" rate.

Order denying plaintiff's motion for judgment under Rule 112, Rules of Civil Practice, and directing the entry of a judgment dismissing the complaint on the merits, and the judgment entered pursuant thereto, unanimously affirmed, with $10 costs and disbursements.

The test is whether the purpose of the use is in furtherance of a public benefit. Here that purpose is to safeguard the "entire public from the menace of the slums." New York City Housing Authority v. Muller (1936) 270 NY 333, 342, 1 NE2d 153, 155, 156, 105 ALR 905. The effectuation of this purpose being a public benefit under the pertinent statutes and cases, the buildings, owned and operated by the defendants and devoted to its accomplishment, are public buildings.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re Potomac Motor Lines, Incorporated

Application Docket No. 55517, Folder 7
October 1, 1945

MOTION, *in proceeding to secure operating authority, for incorporation of evidence taken in another proceeding; denied.*

Certificates of convenience and necessity, § 158 — Procedure — Incorporating evidence from other proceedings.

A request by an applicant for authority to operate additional common carrier service that testimony relative to public convenience and necessity taken in a proceeding by an objector, on its application for operating authority, be incorporated into the record for the purpose of showing public convenience and necessity should be denied although there is substantial identity of parties, where there are divergent routes involved and there may be changing conditions.

By the COMMISSION: This interim matter is placed before us at this time by action of the examiner presiding at the hearing held in Harrisburg, April 30, 1945, whereby he referred to us for ruling, a motion by counsel for applicant, requesting that the testimony relative to public convenience

and necessity taken in the application of Lester H. Frock, trading as Lincoln Bus Lines, Application Docket No. 61373, Folder 3, be incorporated into the record of the instant proceeding for the purpose of showing public convenience and necessity in the latter matter. Objection to the aforesaid motion was placed of record by counsel for Lincoln Bus Lines, applicant in the matter at A. 61373, Folder 3, and protestant to the present application.

For the purpose of our deliberation on the motion, we have reviewed the record of both applications. In so doing, we find that although there is substantial identity of parties of record, that factor is not absolute. We also find that the routes over which each applicant desires to transport persons are not identical and that the testimony of most of the necessity witnesses appearing on behalf of Lincoln Bus Lines apply to that portion of the latter's route which is divergent from the proposed route of Potomac Motor Lines, Inc.

Testimony to prove public necessity is not static. It is susceptible to the influence of changing economic conditions and the temporal element, as well as bias or prejudice, for or against, one or the other of the applicants. Notwithstanding the inequality resultant from permitting one of two adverse parties to rest affirmatively upon the efforts and expense of the other, testimony taken for the purpose of one proceeding is prone to becoming stale or inapplicable to another. Under such circumstances, we shall reiterate our ruling made by order dated December 18, 1944, in Re Hartman Lebanon Transp. Co. A. 34091, Folders 6 and 7, et al., by denying the motion made by counsel for applicant in the instant proceeding; therefore,

It is *ordered:* That the motion made on behalf of Potomac Motor Lines, Inc., at A. 55517, Folder 7, requesting the incorporation by reference into the instant record, of the record at Application Docket No. 61373, as filed by Lester H. Frock, trading as Lincoln Bus Lines, for the purpose of showing public convenience and necessity on behalf of applicant herein, be and is hereby denied and the parties of record be advised accordingly.

SECURITIES AND EXCHANGE COMMISSION

Re Electric Bond & Share Company et al.

File Nos. 54-127, 59-3, 59-12, Release No. 6266
November 30, 1945

APPLICATION *with respect to transfer to holding company of certain shares of common stock registered in names of individual nominees; granted.*

Corporations, § 17 — Stock and stockholders — Nominees — Holding company system.

The existence in nominees of legal title to shares of common stock of a holding company was deemed an unnecessary complexity in the holding company system, and proposed transfers of the shares to the holding company to eliminate such nominee holdings were approved as necessary or appropriate to effectuate the provisions of § 11(b) of the Holding Company Act, 15 USCA § 79k(b).

By the COMMISSION: Electric Bond and Share Company ("Bond and Share"), a registered holding company under the Public Utility Holding Company Act of 1935, having filed with the Commission a supplemental application requesting that the Commission enter an order to conform to the requirements of § 1808 of the Internal Revenue Code, as amended, with respect to the proposed transfer to Bond and Share of the following enumerated shares of the common stock of National Power & Light Company which are beneficially owned by Bond and Share but registered in the names of the following individual nominees of Bond and Share:

Robert Pulleyn	102,800 shares
Harold F. Sanders	742,335 shares
Richard E. Schumacher	213,150 shares
Frank L. Smiley	8,000 shares
Geo. H. Toepfer	228,380 shares
Harry J. Wiegand	330,168 shares

and with respect to the issuance of new certificates for such shares to Bond and Share; and

The Commission deeming the existence in such nominees of legal title to the above securities an unnecessary complexity in the Bond and Share holding company system and the proposed transfers eliminating such nominee holdings as necessary or appropriate to effectuate the provisions of § 11 (b) of the act, and deeming it appropriate to grant the foregoing request of Bond and Share:

It is *ordered* that the transactions specified and itemized below, all as proposed in said supplemental application, are authorized as steps which are necessary or appropriate to effectuate the provisions of § 11 (b) of the Public Utility Holding Company Act of 1935, 15 USCA § 79k (b):

The transfer and delivery to Bond and Share by the individual nominees hereinafter named, of the shares of common stock hereinafter designated of National Power & Light Company, a corporation organized and existing under the laws of the state of New Jersey, and the issuance of new certificates for such shares of common stock to Bond and Share, the beneficial owner thereof:

Robert Pulleyn	102,800 shares
Harold F. Sanders	742,335 shares
Richard E. Schumacher	213,150 shares
Frank L. Smiley	8,000 shares
Geo. H. Toepfer	228,380 shares
Harry J. Wiegand	330,168 shares

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Industrial Progress

Selected information about products, supplies, and services offered by manufacturers. Also announcements of new literature and changes in personnel.

Remington Rand Develops New Accounting Method

MULTI-MATIC ACCOUNTING, a new system of accounting and payroll preparation, has been developed by the systems division, of Remington Rand Inc. It is applicable to small and medium size businesses and to branch office accounting in large organizations. According to the manufacturer, it has been thoroughly pre-tested by selected companies and has proved practical and economical, users reporting savings of 40 per cent in cost and up to 66 per cent in time compared to conventional bookkeeping methods.

The basic principle of Multi-Matic Accounting is the simultaneous posting of a number of financial or statistical reports by means of a single writing. The patented Multi-Matic Accounting Board permits the same entry to appear in a number of different columns on separate reports. For example, a single writing prepares pay checks, employees' earnings history records, and the payroll register, insuring that identical entries will be correctly distributed to the proper columns of the check stub or voucher, payroll register, and individual employee's ledger card.

Multi-Matic Accounting permits similar multi-purpose entries in general ledger accounting. Since transcription of figures is eliminated in preparing a series of reports, the risk of transcription errors does not exist. The triple check (number matching; color matching; and position matching) automatically made on each posting makes erroneous distributions virtually impossible. Should one occur, it is caught the same day, since totals cannot be made unless figures are in register in columns.

Information regarding Multi-Matic Accounting is available through any branch office of Remington Rand Inc., systems division, or from the Systems Division, 315 Fourth avenue, New York 10, New York.

MSA Publishes New Catalog

A 178-PAGE catalog (No. 6-B) has been published by Mine Safety Appliances Company, describing and illustrating the complete range of MSA safety equipment for industrial application, including many new products.

A 6-page introductory section illustrates and describes the research laboratories and plant facilities of Mine Safety Appliances Company.

The regular edition of the 6-B catalog is in its usual 8½ in. x 11 in. size. Also available is a new, handy, pocketsize edition of this catalog 5 in. x 6½ in., containing the same material and number of pages as the large edition, but in the miniature size.

Copies may be secured from Mine Safety Appliances Company, Pittsburgh 8, Pennsylvania.

Bell System Plans Trials of Mobile Radiotelephone Service

THE Bell system recently announced plans for extensive service trials of mobile radiotelephone service along three intercity highway routes totaling nearly 1,000 miles. The routes are those between Chicago and St. Louis, via Ottawa, Peoria, and Springfield, Illinois; between New York, Albany, and Buffalo; and between New York and Boston.

When these services are established it will be possible for any suitably equipped vehicle on the highways along these routes or any boat on adjacent waterways to make and receive calls to or from any telephone connected to lines of the Bell system. Transmitting and receiving stations required to provide the two-way voice communication service will be located along the routes.

It is planned to make the trials under actual operating conditions. A number of companies, including truck lines, bus lines, long distance movers, utilities, and other organizations have indicated a desire to participate in the test. Accordingly it is expected that several hundred vehicles will be equipped initially to send and receive messages on the three routes.

Davey Appoints Three New Dealers

APPOINTMENT of three new dealers was announced recently by Paul H. Davey, president, Davey Compressor Company.

Those appointed were B & H Construction Equipment Co., 835 Meeting street, West Columbia, South Carolina; A. L. Barnum & Son, Seneca blvd., Burdett, New York, and Burton Equipment Company, New Orleans, Louisiana. Each dealer will handle the complete Davey line of portable and stationary compressors, including "Auto-Air" (truck-driven units) and power timber saws.

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LAUNDRY LOAD GETS A *Lift* IN MISSISSIPPI

Well-planned drive by Mississippi Power & Light wins successful response to Laundry Modernization Plan

Laundry modernization—first in a series of *More Power to America* industrial modernization programs—has "really taken hold" in Mississippi, according to B. M. Davis, System Power Consultant of Mississippi Power and Light Company.

Successful response to this co-operative plan for more effective use of electric power grew out of sound planning, strong teamwork, and aggressive follow-through.

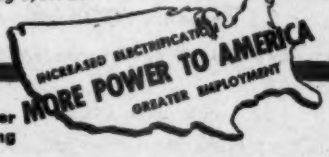
First step was preparation. M. P. & L. became a regional member of the American Institute of Laundering. Its personnel studied the industry, worked with equipment manufacturers, arranged its meetings "according to plan."

Next came the meetings with laundry and dry-cleaning operators—six in all, with an average attendance of 26. Centered around the talking slidefilm "On One Condition," the possibilities of modernization were put on a practical basis. Publicity about the meetings helped the cause along.

A follow-up program is now under way. Folders and booklets have been sent to every laundry. Power consultants are making personal calls. New information will be furnished from time to time.

Already, much good will has been gained, and inquiries concerning further use of electric power have been stimulated. Revenue-producing results are beginning to come in.

G.E. is ready with the basic ammunition that M. P. & L. employed—plans for meetings, salesmen's manuals, and the slidefilm "On One Condition," prepared in co-operation with the American Institute of Laundering. For help in putting the plan into action in your service area, consult your local G-E office. *Apparatus Dept., General Electric Company, Schenectady 5, N. Y.*



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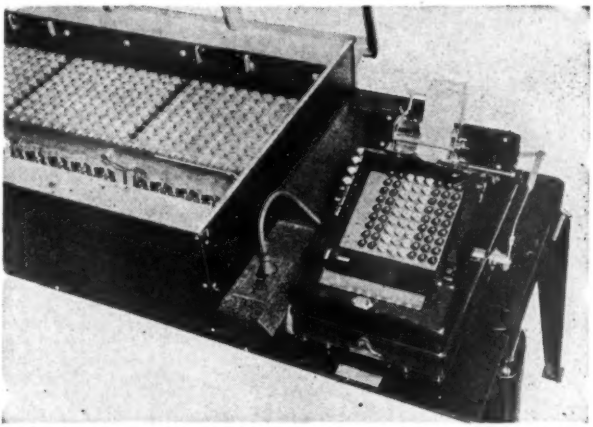

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